15-723

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

JEFFREY WOODS, PETITIONER

v.

TIMOTHY ETHERTON

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals failed to apply either layer of the double deference due on federal habeas review when a state court's *Strickland* analysis is reviewed through AEDPA's lens.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Jeffrey Woods, warden of a Michigan correctional facility. The respondent is Timothy Etherton, an inmate. In the proceedings below, the habeas respondent was Steven Rivard. Woods is the current warden having custody over Etherton.

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The opinion of the Sixth Circuit, App. 1a–38a, is reported sub nom. *Etherton* v. *Rivard*, at 800 F.3d 737 (6th Cir. 2015). The opinion and order of the district court denying habeas relief, App. 39a–81a, is not reported, but is available at 2014 WL 764843. The order of the Michigan Supreme Court denying leave to appeal, App. 82a–83a, is reported at 760 N.W.2d 472 (Mich. 2009). The opinion of the Michigan Court of Appeals denying Etherton's application for leave to appeal, App. 84a, is not reported. The Michigan trial court's decision denying Etherton's motion for relief from judgment, App. 85a–89a, is not reported.

JURISDICTION

The Sixth Circuit entered its opinion on September 2, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . to be confronted with the witnesses against him; and to have the Assistance of Counsel for his defence.

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq.*), provides in part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

INTRODUCTION

As Judge KETHLEDGE explained in his dissent in this case, "[t]he problem with the majority opinion is not that it misapplies the habeas standard, but that it fails to apply that standard at all." App. 36a. And that is not its only problem. Even on direct review, a defendant seeking to show that counsel was constitutionally ineffective must overcome the presumption of effective assistance established in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Thus, when a habeas court reviews a *Strickland* claim through AEDPA's lens, review is "doubly deferential." *Cullen* v. *Pinholster*, 563 U.S. 170, 190 (2011). The Sixth Circuit afforded neither tier of deference here.

This case involves Timothy Etherton's conviction for possessing cocaine with intent to deliver. Etherton drove a car that police followed because it matched information provided by an anonymous tipster. When police stopped the car for speeding and received Etherton's consent to search, they found a brick of cocaine right next to him, in the driver's side door. At trial, officers testified about the content of the tip to explain why they investigated Etherton.

On habeas review, the majority below held that describing the tip violated Etherton's right to confrontation. While holding this claim to be procedurally defaulted, the majority also held that appellate counsel was constitutionally ineffective for failing to raise (1) the confrontation claim and (2) an associated claim of ineffective assistance of trial counsel. The Sixth Circuit granted habeas relief, ordering the State to grant Etherton a new appeal.

At the outset, the majority disregarded AEDPA's plain language that requires comparing state-court decisions with the decisions of "the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Instead, the majority relied on circuit precedent for the proposition that an anonymous tip is testimonial. The majority's inability to identify any decision of this Court holding an anonymous tip to be testimonial should have been the end of its efforts to find a basis for habeas relief.

The majority also rejected numerous reasonable arguments supporting the state court's decision. It failed to acknowledge that the tip was not admitted to prove the truth of the matter asserted. That detail also should have ended the matter. After all, *Crawford* v. *Washington* states that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. 36, 59 n.9 (2004). And the majority rejected reasonable arguments that admitting the tip was harmless, was not plain error, and did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. And it rejected sensible explanations for why it was good strategy for trial counsel not to object and for appellate counsel not to raise the claims.

Even if the State's position on *all* of these points is wrong, if its position on *any* of them is *reasonable*, then Etherton's claim for habeas relief must fail. But the majority did not engage any of these arguments.

This Court should grant certiorari and summarily reverse to reinforce AEDPA's and *Strickland*'s deferential standards of review.

STATEMENT OF THE CASE

A. The discovery of the drugs

The day before Thanksgiving 2006, Michigan State Trooper Trevin Antcliff was working with a team of uniformed and undercover officers, doing drug interdiction on I-96 in Ionia County. App. 40a. The team had received an anonymous tip, and they were on the lookout for a white Audi with two white males, traveling between Detroit and Grand Rapids, possibly carrying cocaine. App. 40a, 8a–11a.

Meanwhile, Timothy Etherton (the driver) and Ryan Pollie (the passenger) were traveling back from Detroit to Grand Rapids in a white Audi, carrying, as it turns out, cocaine. App. 40a–42a. According to passenger Pollie's testimony at trial, the plan that day was to take a trip to Detroit "and then obviously it came out a little bit different." *Id.* Etherton dropped Pollie off at a restaurant in the Detroit suburb of Farmington Hills, and told Pollie that he had to take some family members to the airport. App. 5a; 2/15/07 Trial Tr. at 150–51. Pollie drank some beers while he waited, and 30 to 45 minutes later, Etherton returned and the two left. App. 4a–5a.

As Etherton drove back toward Grand Rapids, he showed Pollie a bag of cocaine. App. 5a. Pollie held the bag a moment and thought, "Wow you know that's quit[e] a bit." *Id.* He then handed the bag back to Etherton. *Id.* Etherton told Pollie that he bought the cocaine on credit, and had to come up with $2,500 to pay for it by Sunday. *Id.*, 2/15/07 Trial Tr. at 153.

Etherton said he could sell some of the cocaine to holiday-weekend bargoers to make up the money. 2/15/07 Trial Tr. at 153–54.

Trooper Antcliff's drug-interdiction operation converged with Etherton's and Pollie's road trip on I-96 approaching Grand Rapids when another member of Antcliff's team recognized Etherton's car as meeting the description from the tip. In response, Antcliff positioned his marked vehicle so that he was driving directly behind it. 2/15/07 Trial Tr. at 77–78. Antcliff followed the car for about two miles, and matched its speed at about 80 miles per hour. *Id.* at 78–79. Antcliff then pulled the car over for speeding. *Id.* at 79.

When they were being pulled over, Etherton handed Pollie the cocaine and told him to put it in the glove compartment. App. 42a. Pollie refused and gave it back to Etherton. *Id.* Pollie testified that Etherton either put it in his lap or in the door. *Id.*

When Trooper Antcliff arrived at the stopped car, he asked Etherton, the driver, whether he had anything illegal in the car. App. 40a. Etherton said no, and consented to a search. App. 40a, 4a. The search turned up 124.3 grams (almost four and a half ounces) of cocaine, in the compartment in the bottom of the driver-side door, under an empty potato-chip bag. App. 4a. Antcliff arrested Etherton and his passenger, Ryan Pollie. App. 41a.

B. The state-court proceedings

Testifying for the prosecution, passenger Pollie described their trip to Detroit, including how Etherton showed him the bag of cocaine. Pollie also admitted to

the jury that he was testifying as part of a plea deal under which he received a nine-month jail sentence for possession of less than 25 grams of cocaine. App. 5a, 42a. When the officers mentioned the tip to explain why they focused on Etherton's white Audi, the court instructed the jury that the tip was not evidence, but rather mentioned only to show why the police did what they did. App. 88a.

The jury convicted Etherton of one count of possession with intent to deliver more than 50 grams and less than 450 grams of cocaine. He was sentenced as a fourth-offense habitual offender to 20 to 40 years' imprisonment.

Etherton appealed, raising five challenges to his conviction and one to his sentence. The Michigan Court of Appeals affirmed. *People* v. *Etherton*, No. 277459, 2008 WL 4604075 (Mich. Ct. App. Oct. 16, 2008). Etherton then sought leave to appeal in the Michigan Supreme Court, which that Court denied. *People* v. *Etherton*, 760 N.W.2d 472 (Mich. 2009).

Nine months later, Etherton returned to the trial court and filed a collateral attack on his conviction in the form of a motion for relief from judgment under subchapter 6.500 of the Michigan Court Rules. The motion raised six new challenges to Etherton's conviction, of which three are relevant here: first, that the admission of the content of the anonymous tip violated his right of confrontation; second, that trial counsel was constitutionally ineffective for failing to adequately object; and third, that appellate counsel was constitutionally ineffective for failing to raise either of the first two claims on direct appeal.

The state trial court rejected the claim of ineffective assistance of appellate counsel on the merits, holding in part that Etherton had "failed to rebut the presumption that 'appellate counsel's decision regarding which claims to pursue was sound appellate strategy.' " App. 89a. The trial court rejected the other two claims because Etherton had failed to raise them on direct appeal and failed to show good cause and actual prejudice to excuse that failure, as required by Michigan Court Rule 6.508(D)(3). *Id.*

Etherton sought leave to appeal in the Michigan Court of Appeals, which was denied under Rule 6.508(D). App. 84a. He then sought leave to appeal in the Michigan Supreme Court, which was denied for the same reason. App. 82a–83a.

C. The district court's habeas denial

Etherton then filed a petition for habeas corpus in the Eastern District of Michigan, raising the same issues he raised in his motion for relief from judgment. The district court (TARNOW, J.) denied relief on the merits of the claims. Although the State argued that the Confrontation Clause claim and ineffective-assistance-of-trial-counsel claim were procedurally defaulted, the district court found it simpler to deny relief on the merits. App. 47a.

The district court observed at the outset that Etherton's "defense was that the prosecution failed to prove that he knew the cocaine was in his car." App. 43a. In a section of the opinion titled, "Clearly Established Federal Law," the district court cited a Sixth Circuit decision holding that statements of a confidential informant are testimonial for Confrontation

Clause purposes. App. 51a–52a. Based on this court-of-appeals precedent, the district court held that the anonymous tip in this case was testimonial. App. 52a.

The district court then examined whether the tip was offered to prove the truth of the matter asserted—information "about the vehicle, the gender and race of the occupants, the time frame for the individual's departure and return, and the route of travel." App. 53a. Though the district court did not conclude that the tip provided any information about the issue disputed at trial (whether Etherton knew there was cocaine in the car), the court "assume[d] the hearsay was offered at least in part to prove the truth of the matter asserted[.]" App. 52a–53a.

The district court held, however, that "the alleged error could not have had a substantial and injurious effect or influence on the jury's verdict and was harmless." App. 55a. It held that it was harmless because "[t]he tipster's statement to the police . . . was not essential to the prosecution's case." App. 54a. "The police officers' testimony at trial established that [Etherton] owned the car he was driving and was seated next to a brick of cocaine when the officers stopped him." App. 54a. "Pollie, moreover, testified that [Etherton] had showed him the cocaine . . and told him how he acquired it." App. 54a–55a. Further, "the trial court specifically instructed the jurors that the testimony regarding the tip given to law enforcement officials was not evidence and that the testimony was admitted to demonstrate why the police did what they did." App. 55a. The district court accordingly denied relief on the Confrontation Clause claim. App. 55a.

As to the claim that *trial* counsel was ineffective, the district court held that, because the testimony was harmless, Etherton could not make the required prejudice showing. App. 71a.

Finally, the district court addressed the claim that *appellate* counsel was ineffective. The court found "that [Etherton's] appellate attorney did a commendable job on appeal. The issues [raised by counsel] were significant enough to require an eight-and-a-half-page, single-spaced court opinion to resolve them." App. 79a. The district court further held that the omitted claims lacked merit, and that it was not unreasonable for appellate counsel to decide not to present them. App. 79a. The district court did, however, grant a certificate of appealability as to all three issues.

D. The Sixth Circuit's habeas grant

Etherton then appealed to the Sixth Circuit. The panel majority (DONALD, J., and MCCALLA, D.J.) rejected the confrontation and ineffective-assistance-of-trial-counsel claims as procedurally defaulted. App. 14a–15a. Like the district court, the majority relied on precedent from the courts of appeals, for the proposition that it is clearly established law that an anonymous tip is testimonial. App. 22a n.2. After confirming that the case turned on "Etherton's knowledge of the presence of the cocaine," App. 26a, the majority listed the limited content of the tip as saying nothing about Etherton's knowledge that cocaine was in the car: "The content of the tip that was introduced described[] (1) two white men; (2) in a [w]hite Audi; (3) driving from Grand Rapids to Detroit and back to Grand Rap-

ids on I-96; and (4) possibly with cocaine in the vehicle." App. 28a. After acknowledging that "each element of the tip was ultimately corroborated by largely undisputed evidence," the majority opined that "the tip tends to suggest improper inferences precisely because it is consistent with the admitted evidence." App. 28a. The majority ultimately granted relief on the ineffective-assistance-of-appellate-counsel claim, holding that counsel was ineffective both for omitting the confrontation claim and the ineffective-assistance-of-trial claim. App. 31a, 32a.

Judge KETHLEDGE dissented. In his view, the problem with the majority opinion

> is not that it misapplies the habeas standard, but that it fails to apply that standard at all. The opinion nowhere gives deference to the state courts, nowhere explains why their application of *Strickland* was unreasonable rather than merely (in the majority's view) incorrect, and nowhere explains why fairminded jurists could view Etherton's claim only the same way the majority does. The opinion, in other words, does exactly what the Supreme Court has repeatedly told us not to do. [App. 36a.]

The dissent took issue with the majority's prejudice analysis, noting that it was "creative—in the sense that making do with the ingredients on hand is often creative—but it is hardly constitutionally required." App. 37a. He observed that "the tip was agnostic as to whom the cocaine belonged," so he had "a hard time seeing the putative prejudice upon which the majority rests its decision." App. 37a.

The dissent concluded by pointing out that "[w]hat it takes" to apply AEDPA's standard correctly is "a willingness to take seriously the arguments that supported or 'could have supported' the state-court decision, and then to ask not merely whether we agree with those arguments, but whether they are coherent and grounded enough in the facts and applicable law that an unbiased jurist could agree with them." App. 38a.

The Sixth Circuit granted the State's motion to stay the mandate pending this petition.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit failed to apply AEDPA's deferential standards.

Etherton ought to have faced a steep uphill climb in seeking habeas relief. AEDPA's exacting standard requires that "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement. *Harrington* v. *Richter*, 562 U.S. 86, 102 (2011). While AEDPA "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," it allows relief only "where there is no possibility that fairminded jurists could disagree that the state court's decision conflicts with this Court's precedent." *Id.* Its standard is "meant to be" "difficult to meet." *Id.*

Unfortunately, as this Court has observed, AEDPA is "a provision of law that some federal judges find too confining[.]" *White* v. *Woodall*, 134 S. Ct. 1697,

1701 (2014); see also *Rapelje* v. *Blackston*, No. 15-161, slip op. at 3 (U.S. Nov. 30, 2015) (SCALIA, J., dissenting from denial of certiorari). The majority below ruled as if it were not confined by AEDPA, and the erroneous opinion that resulted merits summary reversal.

A. The majority below failed to give any deference to the Michigan court's merits adjudication of Etherton's claim.

Although the majority below correctly recited the governing standard of review found in § 2254(d) of AEDPA, its analysis betrayed no signs of actually applying that standard. Accord App. 36a (KETHLEDGE, J., dissenting) ("The [majority] opinion fails to apply [the habeas] standard at all.").

In granting habeas relief on Etherton's claim that appellate counsel was constitutionally ineffective for failing to raise a Confrontation Clause claim, the majority's entire AEDPA analysis is as follows:

> Moreover, having considered the arguments raised by [habeas respondent] Rivard and relied on by the Michigan courts, we hold that it was an unreasonable application of clearly established Federal law for the Michigan court to hold otherwise. Fairminded jurists could not disagree. [App. 31a–32a.]

In granting habeas relief on Etherton's claim that appellate counsel was constitutionally ineffective for failing to raise a claim that trial counsel was ineffective (for failing to object to the supposed Confrontation

Clause violation), the majority's entire AEDPA analysis was equally sparse:

> For the reasons stated above, we find that it was an unreasonable application of Federal law to hold otherwise. [App. 32a–33a.]

But none of "the reasons stated above" included an explanation of why the majority's view was the only reasonable one. Instead, the majority's opinion "granting the writ[] read just like [it] would in a direct appeal." App. 38a (KETHLEDGE, J., dissenting).

The majority had numerous distinct opportunities, detailed in subparts I.B through I.E of this brief, to take seriously the arguments that could have supported a denial of relief. Instead, at every step the majority proceeded as if on de novo review.

B. This Court has never held that an anonymous tip—especially one that does not accuse any individual of a crime—is "testimonial" for Confrontation Clause purposes.

The first question that the Sixth Circuit should have asked is a straightforward one: has the U.S. Supreme Court ever held that an anonymous tip is "testimonial" for Confrontation Clause purposes? On this, reasonable minds cannot differ—this Court has never so held. The majority below cited *Davis* v. *Washington*, 547 U.S. 813, 824 (2006), for the proposition that "[a]n accuser *who makes a formal statement* to government officers bears testimony " App. 22a–23a (quoting *Crawford*, 541 U.S. at 51) (emphasis added). But the anonymous tipster in this case did not

"make[ ] a formal statement[.]" It is hard to understand (and the majority does not explain) how the tip was "formal" in any sense, or even how it was an "accusation," in light of the fact that it did not accuse Etherton (or any specific person) of a crime.

Indeed, *Davis* could not be clearly established law that an anonymous tip *is* testimonial because *Davis* held that the statement at issue (a victim's statement to a 911 operator) was "*not* testimonial." 547 U.S. at 829 (emphasis added). *Davis* does not suggest, let alone prove, that the state court's decision was unreasonable.

The majority then examined *its own precedent* and that of other circuits which establish that statements of a *confidential informant* are testimonial. But that examination was doubly flawed. First, circuit precedent is not, as AEDPA's plain language requires, "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This point is by itself sufficient to demonstrate that the Sixth Circuit has again disregarded Congress's commands in AEDPA. *Parker* v. *Matthews*, 132 S. Ct. 2148, 2155–56 (2012); *Renico* v. *Lett*, 559 U.S. 766, 778–79 (2010).

Second, even if those circuit precedents could be sufficient, but see 28 U.S.C. § 2254(d)(1), a confidential informant is not an anonymous tipster. A CI is a person who is known to and working with police. The CI's identity is a secret to the defendant, for the CI's safety, but not a secret to the police. And of course, if the CI's statement is admitted at trial, the Confrontation Clause requires that the CI testify, at which point, his or her identity is revealed. An anonymous

tipster, on the other hand, is anonymous to all, including to the police, and is not acting as the police's agent.

A reasonable jurist (who mistakenly thought circuit precedent could constitute clearly established law) might think an anonymous tipster is different from a confidential informant because a tip like the one in this case is not the functional equivalent of trial testimony. Rather, it has quite a different function—to spur investigation. To paraphrase *Davis*'s reasoning for holding a statement was not testimonial, the tip's "primary purpose was to enable police assistance to meet an ongoing [crime]." 547 U.S. at 828.

Further, this Court has described the class of statements deemed "testimonial" and therefore covered by the Confrontation Clause, and an anonymous tip does not resemble any of this Court's examples:

- "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially";

- "extrajudicial statements . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and

- "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later

> trial." *Crawford*, 541 U.S. at 51–52 (citations, quotation marks, and alterations omitted).

It is not at all clear that an anonymous tip to police—especially a tip that did not accuse any individual of any crime—would "lead an objective witness reasonably to believe that the [tip] would be available for use at a later trial." *Id.*

In short, the majority should have recognized the absence of any relevant clearly established federal law, and denied habeas relief on that basis alone, or, at the very least, recognized that a reasonable jurist could think that statements by confidential informants differ in a meaningful way from anonymous tips.

C. The majority failed to defer to the state court's reasonable determination that the tip was not admitted for its truth or to recognize that its admission therefore did not violate the Confrontation Clause.

In addition to showing that the tip was testimonial, Etherton was also required to show that it was admitted to prove the truth of the matter asserted. *Crawford* itself states, after all, that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59 n.9. In other words, Etherton must show that the prosecution admitted the anonymous tip (that there was a white Audi with two white men driving between Detroit and Grand Rapids, possibly carrying cocaine) to *prove* those facts (that there was a white Audi with two white men driving between Detroit and Grand Rapids,

possibly carrying cocaine). But the prosecution did not need to prove those facts because, as the majority acknowledged, those facts were established by "largely undisputed evidence." App. 28a, 4a.

All three times testimony regarding the tip was admitted, it was to provide context to the police investigation—to explain why the police chose to follow this particular car, to pull it over, and to seek consent to search. App. 8a–10a (quoting the three references). Again, the majority below provided almost no explanation as to why it felt the statement was admitted to prove its truth. The majority referred to the fact that "[i]t was elicited by the prosecution from three different witnesses during its case-in-chief," App. 23a, but that does not show that no fairminded jurist could think it was being mentioned for a reason other than its truth. Quite the opposite: given that the only facts in the tip were undisputed facts, a reasonable jurist could conclude, as the state court did, that "the tip was not evidence" but was mentioned "only to show why the police did what they did." App. 88a. And the reason the prosecution elicited it three times from three different witnesses was to explain why each of these three different witnesses investigated as they did, not to prove the tip's truth.

The majority also says that "the prosecution emphasized the tip during closing argument[.]" App. 23a. But again, this does not mean that the prosecutor argued that the tip proved that the matter asserted in the tip was true. The prosecutor mentioned the tip in *rebuttal* to respond to defense counsel's insinuations that Etherton did not fit the profile of a drug dealer.

App. 88a (explaining references during closing argument were "in response to defense theories of the case") (citing 2/15/07 Trial Tr. at 216–17). The prosecutor mentioned the tip in response to explain again why the police investigated Etherton.

In short, reasonable jurists could agree with the state trial court that the tip was mentioned not to prove undisputed facts but to explain why the police pulled the car over in the first place.

The majority also declined to grapple with the fact that the trial court instructed the jury not to consider the tip for its truth, but only to explain why the police pulled over the car. App. 88a. By omitting this instruction, the majority was spared from having to consider whether Etherton had overcome the "almost invariable assumption of the law that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). And while the majority did consider the instruction when discussing whether the error was harmless, a fairminded jurist might think that the instruction meant there was no Confrontation Clause violation in the first place. *Id.* at 211 (holding that "the Confrontation Clause is *not violated* by the admission of a nontestifying codefendant's confession with a proper limiting instruction") (emphasis added); see also *United States* v. *Applewhite*, 72 F.3d 140, 145 (D.C. Cir. 1995) (concluding that a limiting instruction was "sufficient to cure any Confrontation Clause problem"). Yet the majority did not consider the instruction for that purpose.

In sum, a fairminded jurist could conclude that no Confrontation Clause violation occurred *both* because

the tip was not admitted for its truth *and* because the instruction cured the violation.

D. The majority failed to consider seriously arguments about harmless error or plain error.

The majority also failed to give any deference to the state court in two categories of analysis that relate to whether admitting the tip even affected the outcome of the trial.

As to harmlessness, the majority did not take seriously any argument that the admission of the tip was harmless. It characterized the trial court's instruction not to consider the tip as evidence of Etherton's guilt as an "attempt to issue a curative instruction," declared without explanation that the instruction was vague, and surmised that the jury "could have" interpreted it "to mean that the tip by itself was not sufficient to find Etherton guilty, but that it could otherwise be considered for its truth." App. 26a. AEDPA cannot function as intended if a federal court can overcome its near-total bar to habeas relief by speculating that a jury *might* think an instruction means the opposite of what it says.

The majority's harmlessness analysis was dubious throughout. Its crux was that, because Pollie's testimony agreed with the tip, it was the tip that established Pollie as credible, which bolstered his testimony that Etherton was the possessor of the cocaine. But this would be a stretch even on de novo review. A jury might have thought Pollie was credible not because his information agreed with the tip, but because his information agreed with the facts that "were not

contested at trial"—that cocaine was found in Etherton's car while Etherton was driving it in the driver's side door just inches away from Etherton. App. 3a–4a. There is no reason that the jury would view Pollie as any more credible as to fact *at issue* in the case (i.e., whether Etherton knew about the cocaine) merely because his testimony matched the uncontested facts. Indeed, the majority's theory fails to explain why any inferences about Etherton's knowledge of the cocaine must have come from the tip, and not from the undisputed facts.

But again, the State does not need to establish that the majority's reasoning is erroneous. For the habeas grant to be justified, the majority's reasoning must not only be correct; it must be the only reasonable view of the case. It is not. It is reasonable to think as the dissent did, App. 36a, as the district court did, App. 55a, and as the state court did, App. 89a, that the admission of the tip had no impact on the outcome of the case.

As to plain error, the majority did not seriously consider any argument that the supposed error was not plain. The majority felt that it was plain that the anonymous tip was testimonial. App. 22a. But there was no plain-error analysis as to whether the tip was admitted for its truth.

As to another aspect of plain-error review, the majority did not seriously consider any argument that the supposed error did not "seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings independent of [Etherton's] innocence." App. 25a. The majority cited one decision of the Michigan Supreme Court in which that Court held, with almost no

discussion, that an error met that standard. App. 30a–31a (quoting *People* v. *Shafier*, 768 N.W.2d 305, 316 (Mich. 2009)). The majority found that Etherton's case "bears striking similarities to *Shafier*," even though the error in *Shafier* was the admission of the defendant's post-*Miranda* silence, contrary to *Doyle* v. *Ohio*, 426 U.S. 610 (1976), not the admission of an anonymous tip that contained only uncontested facts.

The majority could have looked to any number of Michigan cases to inform its analysis of the "fourth prong" of Michigan plain-error analysis. E.g., *People* v. *Cain*, 869 N.W.2d 829, 840 (Mich. 2015) (fourth prong not met where jury was not properly sworn); *People* v. *Vaughn*, 821 N.W.2d 288, 305 (Mich. 2012) (fourth prong not met where courtroom was closed during jury selection); *People* v. *Pipes*, 715 N.W.2d 290, 300 (Mich. 2006) (fourth prong not met where non-testifying codefendant's confession was admitted (*Bruton* error)); *People* v. *Carines*, 597 N.W.2d 130, 143 (Mich. 1999) (fourth prong not met where jury instructions did not correctly instruct as to elements of the offense); *People* v. *Johnson*, 866 N.W.2d 883, 890 (Mich. Ct. App.), vacated in part on other grounds, 864 N.W.2d 147 (Mich. 2015) (fourth prong not met where other-acts evidence was improperly admitted); *People* v. *Fyda*, 793 N.W.2d 712, 722 (Mich. Ct. App. 2010) (fourth prong not met where prosecutor arguably denigrated defense counsel); *People* v. *Scott*, 739 N.W.2d 702 (Mich. Ct. App. 2007) (fourth prong not met by double-jeopardy violation in charging, where conviction did not constitute double jeopardy); *People* v. *Dobek*, 732 N.W.2d 546, 567 (Mich. Ct. App. 2007) (fourth prong not met even if other-acts evidence had been improperly admitted); *People* v. *Ackerman*, 669

N.W.2d 818, 827–28 (Mich. Ct. App. 2003) (fourth prong not met where prosecutor arguably asked defendant to comment on witnesses' credibility); *People* v. *Callon*, 662 N.W.2d 501, 514 (Mich. Ct. App. 2003) (fourth prong not met where prosecutor argued facts not in evidence); *People* v. *Barber*, 659 N.W.2d 674, 680 (Mich. Ct. App. 2003) (fourth prong not met where prosecutor referred to witness's guilty plea in closing argument); *People* v. *Rodriguez*, 650 N.W.2d 96, 107 (Mich. Ct. App. 2002) (fourth prong not met where court allowed witness to invoke right against self-incrimination without adequate questioning).

Properly applying AEDPA's standard after examining any of these cases, a fairminded jurist could agree that the trial court's decision did not undermine the fairness, integrity, or public reputation of judicial proceedings, and therefore that plain-error review precluded relief.

E. The majority failed to consider reasons trial counsel might have decided not to object to statements about the tip.

As to whether appellate counsel was ineffective for not asserting ineffective assistance based on trial counsel's decision to not object to the tip, the majority also failed to consider whether that decision might have been sound trial strategy. Trial counsel may well have reasonably decided that to object to the tip would distract from her defense theory and harm her credibility with the jury. By objecting, trial counsel would have signaled to the jury that the defense had something to hide or something to fear regarding the tip. App. 88a (state court explaining that "trial counsel's

strategy" included "show[ing] [Etherton's] non-involvement and possible responsibility of the passenger (who was also charged)").

Further, the defense had no reason to contest the accuracy of the tip. The defense's theory, remember, "was that the prosecution failed to prove that [Etherton] knew the cocaine was in his car." App. 43a. Counsel did not argue, for example, that Etherton was not in the car, or that the cocaine was not in the car. Rather, counsel chose the more reasonable defense theory that both Etherton and the cocaine were in the car, but that the prosecution had not proven the cocaine belonged to Etherton. In light of this choice, it was reasonable for counsel to decide not to enter distracting objections to the admission of uncontested facts.

The majority below did not consider any of this, but simply held, that "[b]ecause there was a Confrontation Clause violation that resulted in substantial prejudice, there is a reasonable probability that Michigan appellate courts would have found trial counsel constitutionally ineffective." App. 32a. But because there was a reasonable argument that trial counsel's decision not to object was trial strategy, the majority erred in granting relief.

And finally, the majority below did not seriously consider whether the decision by appellate counsel to omit this claim was a reasonable decision by a competent attorney. This is discussed in fuller detail in Section II below.

* * *

In sum, at every step of the analysis, there was a reasonable argument that defeated Etherton's claim for habeas relief, and at every step, the majority below failed to take these arguments seriously. Other than a brief nod to AEDPA's standard of review, there is no indication that the majority did anything other than a de novo review of the claims. For any of these reasons, or for all of them, this Court should summarily reverse the Sixth Circuit's decision.

II. The majority below failed to apply the correct standard for ineffective assistance of appellate counsel.

In addition to the layer of deference afforded by AEDPA, the standard of review for ineffective assistance of counsel is also highly deferential to counsel's performance. Under *Strickland*'s standard, courts are to presume that counsel's decisions are reasonable trial strategy, finding deficient performance only where no competent counsel could have made the decisions counsel made. *Strickland*, 466 U.S. at 689–90.

In the appellate context, this standard means that a petitioner must do more than simply show that appellate counsel omitted a non-frivolous or even a potentially meritorious claim. Rather, "only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Smith* v. *Robbins*, 528 U.S. 259, 288 (2000) (quoting *Gray* v. *Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

If a petitioner could show ineffective assistance of appellate counsel merely by showing that appellate

counsel had omitted a meritorious issue (itself a difficult showing and not one Etherton has made), that would collapse the deficiency prong into the prejudice prong. That erroneous approach would evaluate counsel's performance with the benefit of hindsight and the knowledge that the claims chosen did not succeed, and that at least one omitted claim (in the reviewing court's opinion) did. The correct standard, in contrast, places the reviewing court in the shoes of appellate counsel at the time of the appeal, without the foreknowledge of what a reviewing court will find meritorious. The majority below made no such effort; in looking at the claims appellate counsel chose to present, the majority simply said, "Many less meritorious issues were raised on direct appeal in this case, which suggests that the failure to raise the issue was an oversight and not deliberate strategy." App. 19a–20a.

If the panel majority had applied the correct standard, it might have considered, as the district court and the state court did, the several serious claims appellate counsel did present on appeal, each of which required several paragraphs to adjudicate, resulting in, as the district court pointed out, "an eight-and-a-half-page, single-spaced court opinion." App. 79a; see *Etherton*, 2008 WL 4604075 (opinion of the Michigan Court of Appeals on Etherton's direct appeal). (In particular, it is hard to argue that appellate counsel's claim that Michigan's sentencing guidelines violate *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), was *clearly* weak, in light of the fact that the Michigan Supreme Court has since accepted the same argument as *correct*. *People* v. *Lockridge*, 498 Mich. 358 (2015).)

Appellate counsel could have considered the omitted claims to be meritless for any or all of the reasons stated in Section I above, and for any or all of the reasons why 12 of the 14 judges who have ruled upon them so far have found them meritless. Or she could have even considered them potentially meritorious but still reasonably chosen to omit them in favor of other claims she felt were stronger. Such a decision is not a sign of incompetence. This Court has recognized "the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possibly, or at most on a few key issues." *Jones* v. *Barnes*, 463 U.S. 745, 751–52 (1983). Even accepting the holding of the majority below that the omitted issues had merit, it was reasonable for counsel to think they had less of a chance of success than the issues she chose to raise.

Thus, even if this Court were to agree that the omitted claims have merit, the majority below still erred in finding that no fairminded jurist could hold that no competent appellate attorney could decide to omit these claims. This Court should summarily reverse.

CONCLUSION

The petition for writ of certiorari should be granted, and this Court should summarily reverse.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TIMOTHY ETHERTON,
Petitioner-Appellant,
v.

STEVEN RIVARD,
Respondent-Appellee.

No. 14-1373

Appeal from the United States District Court . for the Eastern District of Michigan at Detroit
No. 2:11-cv-11958—Arthur J. Tarnow, District Judge.

Decided and Filed: September 2, 2015

Before: KETHLEDGE and DONALD, Circuit Judges; McCALLA, District Judge.*

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* The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

COUNSEL

ON BRIEF: James Sterling Lawrence, Southfield, Michigan, for Appellant. David H. Goodkin, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

McCALLA, D.J., delivered the opinion of the court in which DONALD, J., joined. KETHLEDGE, J. (pp. 24–25), delivered a separate dissenting opinion.

OPINION

JON P McCALLA, District Judge. On February 15, 2007, a Michigan jury convicted Timothy Etherton of possession with intent to deliver cocaine. After exhausting both direct and collateral appellate review procedures in Michigan, Etherton timely filed a petition for writ habeas corpus in the United States District Court for the Eastern District of Michigan. The district court denied Etherton's petition but certified for appeal four issues: (1) whether the anonymous tip presented at trial denied Etherton's right to confrontation under the Sixth Amendment so as to result in prejudice; (2) whether the prosecutor improperly vouched for the credibility of a witness during closing argument; (3) whether Etherton's counsel's failure to object to the anonymous tip, as well as other alleged shortcomings, amounted to prejudicially ineffective assistance of counsel; and (4) whether Etherton was prejudiced by ineffective assistance of counsel on appeal. For the reasons

discussed below, we **AFFIRM IN PART** and **REVERSE IN PART** the district court's decision, and **REMAND** with directions to issue a writ of habeas corpus unless Etherton is afforded a new appeal or, in the alternative, is granted a new trial.

I

A

Timothy Etherton was tried in Michigan State Court on a single count of possession with intent to deliver 50 grams or more but less than 450 grams of cocaine. (R. 5-3, 5-4.) The trial began with voir dire at 9:09 a.m. on February 15, 2007. (R. 5-3 at PageID 243.) The prosecutor called his first witness at 10:59 a.m. (R. 5-3 at PageID 315.) After roughly forty-five minutes of testimony, the jury broke for lunch and returned approximately an hour later. (R. 5-3 at PageID 341–42.) At 3:18 p.m., the final witness stepped down. (R. 5-4 at PageID 441.) The jury began deliberations at 5:16 p.m. and returned a verdict of guilty at 6:10 p.m. that same day. (R. 5-4 at PageID 496, 499–500.)

During trial, the prosecution called six witnesses, (R. 5-3 at PageID 314, 342, 370, 380, 388, 421), and introduced three exhibits into evidence: a video tape of the stop and search of Etherton's car (R. 5-3 at PageID 322); a bag of cocaine (R. 5-3 at PageID 354); and a plastic bag (R. 5-3 at PageID 354).

The following facts were not contested at trial: Etherton was driving a white Audi on I-96 between Detroit and Grand Rapids at the time he was pulled over for speeding; Etherton admitted that the Audi

was his car; co-defendant Ryan Pollie was in the passenger seat; Etherton initially did not consent to a search of the car, but then quickly did consent to a search; Trooper Trevin Antcliff did a preliminary physical search of the car, but did not find anything illegal; a K-9 unit was called to the scene and searched the car, but also did not find anything illegal; Detective Adam Mercer then searched the car and ultimately found a 125.2 gram bag of cocaine under an empty bag of potato chips in the map compartment of the driver's side door. Although the bag was tested, neither Etherton's nor Pollie's fingerprints were found on the bag.

The only evidence that Etherton had knowledge that the cocaine was in the car—aside from potential inferences that could arguably be drawn from the above-mentioned evidence— came from two sources: first, the testimony of Etherton's co-defendant, Pollie; and, second, an anonymous tip that was introduced for its truth.

1

On direct examination, Pollie testified in some detail regarding the day that he and Etherton were arrested. (R. 5-4 at PageID 388–94.) Pollie stated that he accompanied Etherton on a trip to Detroit in order to drop off members of Etherton's family at the airport. (R. 5-4 at PageID 388–89.) According to Pollie, Etherton dropped him off at a Ruby Tuesday's restaurant while Pollie "was under the assumption that [Etherton] was going to the airport to drop these family members off." (R. 5-4 at PageID 390.) Pollie testified that he had a couple of beers while he was at the restaurant before Etherton came back to pick him

up approximately thirty to forty-five minutes later. (R. 5-4 at PageID 390–91.) Pollie stated that after he and Etherton got back in the car:

> [W]e pull out of the parking lot and we're about to get onto the highway and that's when the package of cocaine became known to myself. He showed it to me. I held it like kind of, wow you know that's quit [*sic*] a bit. Gave it back to him.

(R. 5-4 at PageID 391:4–8.) Pollie went on to explain that he and Etherton talked about how he had obtained the cocaine. According to Pollie:

> [Etherton] met a guy down by McDonald's, I think it was further down the road from the Ruby Tuesday's. . . . What initially was supposed to happen was the title for his vehicle was supposed to go up to pay for the--- I guess as collateral and the vehicle had got transferred from his dad's name the previous day into his name so he didn't have the title. So he was supposed to return there by Sunday to go ahead and pay the money for the cocaine that was given to him that day. . . . [Etherton] made a comment about, you know, I can do a certain amount of it and then still be able to go ahead and sell the rest for payment.

(R. 5-4 at PageID 392:7–25.)

Pollie also testified on direct that he was testifying as part of a plea agreement. (R. 5-4 at PageID 389.) Pollie acknowledged that he was to be sentenced to nine months in jail as a result of the plea. (*Id.*)

On cross, redirect, and recross-examination, Pollie acknowledged at least eight facts that were damaging to his testimony. (*See* R. 5-4 at PageID 402–411, 418–21.) First, he disclosed on redirect examination that he had read the police reports concerning both his arrest and Etherton's. (R. 5-4 at PageID 416.) Second, he acknowledged that he had been convicted of both cocaine possession and distribution in the past. (R. 5-4 at PageID 409–10.) Third, he admitted that he had been alone in the car on the day of the arrest. (R. 5-4 at PageID 403.) Fourth, he conceded that he had eaten chips that day:

> Q. Now there was testimony that the cocaine was found on the driver's side door and there were chips----a bag of chips covering it.
>
> A. I don't know what was covering it. I wasn't able to see that side of the vehicle when the cop took that out----took that out of wherever he found it.
>
> Q. Okay but you admitted that you had chips that day?
>
> A. I did.

(R. 5-4 at PageID 405:18–25.) Fifth, Pollie admitted that he was allowed to plead to a lesser charge when he was otherwise facing what he agreed was "a very lengthy incarceration." (R. 5-4 at PageID 409, 420.) Sixth, Pollie testified that he believed his fingerprints would be on the bag of cocaine. (R. 5-4 at PageID 405:18–25.) Specifically, Pollie testified:

Q. And you plead[ed] also not just for a deal but because you knew your finger prints were going to come back on the---or you thought they were going to come back on the bag, didn't you?

A. That's correct. I explained---

Q. Because you had handled the bag?

A. I did.

(R. 5-4 at PageID 405:18–25.) Seventh, he acknowledged that he had initially lied to the police and had only changed his story when offered a plea deal. (R. 5-4 at PageID 416, 419–20.) Last, defense counsel impeached Pollie concerning his testimony regarding not driving. The following exchange occurred on cross-examination after defense counsel asked whether Pollie had driven on the way to Detroit:

A. I do not have a driver's license, so no I did not drive.

Q. Well, that doesn't mean you can't drive. Have you never driven without--- you're telling---how long have you not had a license?

A. I'm not sure actually. Probably about a year.

Q. Okay and you're telling the jury that in a year you have never driven a vehicle?

A. Oh, I have. But I didn't on that day.

(R. 5-4 at PageID 405:18–25.) On recross-examination, defense counsel once again asked about Pollie's driving:

> Q. Okay and also sir you said that you don't drive or that you wouldn't have driven that day but isn't it true that Mr. Etherton actually passed you driving in a truck, I think it was his brother's truck or roommate[']s Blazer, when he went to pick you up?
>
> A. Yeah, I went to cash my check. That's correct.
>
> Q. Okay, so you admit that you were driving earlier that day when you just said you wouldn't have been driving.
>
> A. I didn't drive his vehicle but I can admit to driving to cash my check.

(R. 5-4 at PageID 420:21–422:5.)

2

Recognizing the factual questions inherent in Pollie's testimony, the Court must examine the role of the accusatory content of the tip testimony in the trial. Testimony regarding the anonymous tip was elicited by the prosecution on three separate occasions. The first elicitation occurred during the direct examination of Trooper Antcliff of the Michigan State Police, who testified that he pulled over Etherton's car. (R. 5-3 at PageID 315–17.) The prosecutor asked Antcliff why he pulled Etherton over. (R. 5-3 at PageID 316:15–316:16.) Antcliff responded:

> Well, on our radio I received a call from Lieutenant that the CMET team, Lieutenant Roe, and he advised that there was a white Audi matching the description from an anonymous tip that we were looking for. A BOL was put out for us, a be on the look out [*sic*] for a white Audi with two while [*sic*] males traveling from Grand Rapids to Detroit back to Grand Rapids, possibly carrying cocaine in the vehicle. . . . So Lieutenant Roe advised that he had---the possible suspect vehicle in sight. I was in position near Lieutenant Roe's vehicle, he advised me that the suspect vehicle was in front of him.

(R. 5-3 at PageID 316:17–317:4.)

The prosecutor then elicited testimony regarding the tip for a second time during the direct examination of Detective Mercer, who stated:

> We wanted, based on the tip, we wanted to try and separate the two passengers of the vehicle, the driver and the passenger and give a short interview and see if their stories matched up and if they didn't that would add to our probable cause and go along with the tip that we had received.

(R. 5-3 at Page ID 344:21–345:1.)

The third time the prosecutor elicited testimony regarding the tip was from Detective Sergeant Joel Abendroth. (R. 5-4 at PageID 427.) The prosecutor specifically asked Abendroth about the tip: "[T]o cut to the chase, in regard to the defendant here did you

receive some sort of tip earlier in the day?" (R. 5-4 at PageID 427:7–8.) Abendroth responded:

> Yes, we did. We received a very specific tip. I followed up personally on the tip and spoke to the individual that received the anonymous call. The tip consisted of information provided to a secretary at the Grand Rapids vice unit, reference [to] a specific vehicle, a white Audi, occupied by two individuals, two white males. The tip was specific on the time frame they were going to be leaving Grand Rapids and specific on the approximate time frame returning back. It also included a route of travel along I-96. The tip was that the---

(R. 5-4 at PageID 427:9–18.) At this point, defense counsel objected to Abendroth's testimony as hearsay. (R. 5-4 at PageID 427:19–21.) The trial judge did not rule on the objection; the prosecutor simply stated, "I'll move on, your Honor," and then proceeded to ask her next question. (R. 5-4 at PageID 427:22–24.) The prosecutor next asked, "You received a tip?" (R. 5-4 at PageID 427:24.) Abendroth responded, "Yes." (R. 5-4 at PageID 427:25.) The prosecutor then inquired "who Grand Rapids vice is." (R. 5-4 at PageID 428:1.) Abendroth responded that "Grand Rapids vice is the drug team for the City of Grand Rapids." (R. 5-4 at PageID 428:2–3.)

Having elicited testimony regarding the tip in its case-in-chief, the prosecution used the content of the tip during closing argument:

> We started out with Trooper Antcliff and you got to see the video, which is kind of neat

> cause that doesn't always happen but you saw what precipitated this. There was a tip that a white Audi would be traveling at such and such time on I-96 with two white males that came in through the drug team in Grand Rapids . .

(R. 5-4 at PageID 452:9–14.) During his rebuttal argument, the prosecutor once again discussed the content of the tip:

> What [the witnesses] did talk about was this tip that they received and coincidently, the defendant and his car matched the tip headed west from Detroit to Grand Rapids. Was there another Audi stopped that day, yeah and they told you about that. But this is the Audi that was found later in the day that matched the tip, two white males heading from Detroit to Grand Rapids, and coincidently they have a hundred and twenty-five grams of cocaine in the car.

(R. 5-4 at PageID 476:8–16.)[1]

---

[1] The prosecution also made comments in closing that Etherton argues amounted to improper vouching for Pollie:

> And honestly enough, what else did he tell you? Do I wish that we could bring somebody in here that doesn't have a criminal history, who doesn't have prior drug convictions and who didn't lie to the police when he initially encountered them? Heck yeah I wish we could do that but those aren't the kind of people we're dealing with in the drug culture, the drug world. So

B

Following his conviction, Etherton was sentenced to twenty to forty years in prison. (R. 5-5 at PageID 515.) Etherton sought relief on both direct and collateral appeal in the State of Michigan. On direct review, Etherton's counsel sought a reversal of the conviction on four grounds: (1) that the trial court abused its discretion in denying defendant's request for an adjournment of trial; (2) that defense counsel was ineffective for failing to adequately prepare for trial; (3) that the trial court erred in denying defendant's motion to suppress the evidence found in

---

> what we have is Mr. Pollie who came in here and was incredibly frank with you.
>
> What else did Mr. Pollie do today that would suggest to you that he was lying? Let me point out some of his testimony and she raised it. He said I never drove his car and then a follow up question, because I don't have a license. Well are you saying you never drive? What did he say, when she asked him didn't he pass you driving before he got to your house? Yeah, he did. He admitted under oath on the stand that he was committing another crime today. Thus exposing himself to potentially more criminal charges. Does that sound like somebody is lying to you, someone who is not trying to be truthful with you? Somebody who is arguing with the----the attorney? That's one of the questions the Judge will give you when you're judging creditability. Did he sound like somebody who was hiding something, arguing with the attorney? No, in fact he admitted another crime today that he as [sic] committing in answering her questions truthfully.

(R. 5-4 at PageID 455:1–456:5, 479:9–480:1.)

Etherton's car; and (4) on the basis of purportedly newly discovered evidence. (R. 5-7 at PageID 641–80.) The Michigan Court of Appeals affirmed the trial court on October 16, 2008. (R. 5-7 at PageID 706–14.) On February 24, 2009, the Michigan Supreme Court denied Etherton's application for leave to appeal. (R. 5-8.)

Etherton subsequently filed a motion for relief from judgment pursuant to Subchapter 6.500 of the Michigan Rules of Court. (R. 5-11.) In the motion, Etherton argued six grounds for relief: (1) that the anonymous tip was hearsay and violated his right to confrontation; (2) that the prosecutor improperly explained during closing argument why he had given a plea deal to Pollie but not Etherton; (3) that the prosecutor acted improperly in closing argument by vouching for Pollie's credibility; (4) that the prosecution presented false testimony; (5) that defense counsel at trial was ineffective; and (6) that appellate counsel was ineffective. (R. 5-11 at PageID 920-22.) The Circuit Court for Ionia County denied the motion. (R. 5-12.) That court found that the first five grounds were procedurally defaulted under M.C.R. 6.508(D)(3), which prohibits granting a petitioner relief on grounds "other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence." (R. 5-12 at PageID 987.) Because the first five asserted grounds were not jurisdictional and could have been—but were not—raised on appeal, the Ionia County Circuit Court declined to review them on the merits. (*See id.*) The court only considered Etherton's argument that his appellate counsel was ineffective, denying the motion

on the basis of both sound strategy and a lack of prejudice. (R. 5-12 at PageID 988.)

The Michigan Court of Appeals denied Etherton's application for leave to appeal, noting that Etherton had "failed to meet his burden of establishing entitlement to relief under MCR 6.508(D)." (R. 5-9 at PageID 773.) On October 26, 2010, the Supreme Court of Michigan again denied Etherton's application for leave to appeal on the same grounds. (R. 5-10.)

C

Etherton timely filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 on May 4, 2011. (R. 1.) His petition asserted the same six grounds that he had raised on collateral review in the state courts of Michigan. (*Id.*) On February 26, 2014, the United States Court for the Eastern District of Michigan issued an opinion denying Etherton's petition for relief and certifying four issues for appeal: (1) whether the admission of the anonymous tip violated Etherton's right to confrontation and was prejudicial; (2) whether the prosecution improperly vouched for Pollie's credibility; (3) whether trial counsel was constitutionally ineffective; and (4) whether appellate counsel was constitutionally ineffective. Etherton now argues that each issue entitles him to a new trial. Rivard argues in response that the first three issues certified for appeal were procedurally defaulted by Etherton when he failed to raise them on direct appeal and that, in any case, none of the four issues raised entitles Etherton to relief on the merits.

II

We agree that Etherton has procedurally defaulted the first three claims certified for appeal. A habeas petitioner procedurally defaults a claim if four conditions are met:

> "(1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default."

Guilmette v. Howes, 624 F.3d 286, 290 (6th Cir. 2010) (en banc) (quoting *Tolliver v. Sheets*, 594 F.3d 900, 928 n.11 (6th Cir. 2010)).

Etherton argues that there is no state procedural rule that barred him from raising new arguments in his motion for relief from judgment. He is mistaken. As noted in Part I.B, *supra*, M.C.R. 6.508(D)(3) prohibits granting a petitioner relief on grounds "other than jurisdictional defects, which could have been raised on appeal." Etherton does not argue that the first three grounds certified for appeal were jurisdictional defects, nor does he argue that they could not have been raised on direct appeal. We therefore conclude that Etherton failed to comply with a state procedural rule.

As to the second condition, the Supreme Court has held that there is a presumption that a state court denying a federal claim "adjudicated the claim on the merits in the absence of any indication or state-law

procedural principles to the contrary." *Harrington v. Richter*, 131 S. Ct. 770, 784–85 (2011). As we noted in *Barton v. Warden*, the presumption is rebuttable. 786 F.3d 450, 460 (6th Cir. 2015). "The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Richter*, 131 S. Ct. at 785 (citing *Yist v. Nunnemaker*, 501 U.S. 797, 803 (1991)). In general, however, "we may only treat a state court order as enforcing the procedural default rule when it unambiguously relied on that rule." *Peoples v. Lafler*, 734 F.3d 503, 512 (6th Cir. 2013).

In this case, the state courts applied the procedural rule. Where the short orders of appellate courts "are ambiguous as to whether they refer to procedural default or denial of relief on the merits," we must "look to the last reasoned state court opinion to determine the basis for the state court's rejection of [a petitioner's] claim." *Guilmette*, 624 F.3d at 291. Because both the intermediate and supreme courts simply issued form orders in this case finding that Etherton had not met his burden to establish relief under M.C.R. 6.508(D), we look to the Ionia County Circuit Court's decision. (R. 5-12.)

Although the Ionia County Court's decision is far from clear, it unambiguously relies on a procedural rule in dismissing the first three claims certified for appeal in this case. The court begins its opinion by questioning "whether the court can even grant relief under MCR 6.508(D)(3)." (R. 5-12 at PageID 987.) According to the court's opinion, "[w]ith the exception of the failure to appoint counsel, constitutional violations, including the denial of effective assistance

of counsel, do not constitute a jurisdictional defect under MCR 6.508(D)." (*Id.*) The court then addressed only one of Etherton's claims on the merits: his claim for ineffective assistance of appellate counsel. (R. 5-12 at PageID 988.) Without further discussing any of his other claims, the court denied Etherton's motion. (*Id.*) Because of the unambiguous references to MCR 6.508(D)(3)—which applies only in cases of procedural default—and the context of the opinion that makes a ruling on the basis of procedural default as opposed to a finding on the merits the more likely explanation, we find that the state courts enforced their procedural default rule as to Etherton's first three claims.

Procedural default is not, however, an absolute bar to habeas relief. *See McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004). "Ineffective assistance of counsel can supply the cause that, together with prejudice, would excuse a procedural default." *Id.* (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). We therefore turn to the fourth issue certified for appeal: whether Etherton's appellate counsel was constitutionally ineffective.

III

Because the Michigan courts ruled on the merits of Etherton's ineffective assistance of appellate counsel claim (*see* R. 5-12 at PageID 988), Etherton is only entitled to relief if he can demonstrate that the ruling was either: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). At issue in this

case is whether the Michigan court's ruling was "an unreasonable application" of clearly established Federal law.

Under the "unreasonable application" clause, habeas relief is available in two scenarios: first, if "the state court correctly identifie[s] the correct legal principle from Supreme Court precedent but unreasonably applie[s] that principle to the facts of the case before it," *Dennis v. Mitchell*, 354 F.3d 511, 517 (6th Cir. 2003); and second, when a "state court decision either unreasonably extends or unreasonably refuses to extend a legal principle from the Supreme Court precedent to a new context," *Keith v. Mitchell*, 455 F.3d 662, 669 (6th Cir. 2006).

We first consider whether the Michigan court "identified the correct legal principle." *Dennis*, 354 F.3d at 517. To prevail on a habeas petition on the basis of ineffective assistance of appellate counsel, a habeas petitioner must demonstrate that his appellate counsel's failure to raise a potentially meritorious argument rose to the level of a constitutional violation under *Strickland v. Washington*, 466 U.S. 668 (1984). *Smith v. Robbins*, 528 U.S. 259, 289 (2000). To meet this burden, a petitioner must satisfy two prongs: deficiency and prejudice. In order to demonstrate deficiency, a petitioner must show his "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To demonstrate prejudice, a petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Consequently,

in the appellate context as to counsel's failure to raise a claim, a petitioner must show that "there is a reasonable probability that the claim would have prevailed at the time counsel failed to raise it." *McFarland*, 356 F.3d at 699.

The Michigan court applied the correct legal principal from Supreme Court precedent. (*See* R. 5-12 at PageID 988 (considering, under state law, an analogous two prongs in evaluating the merits of Etherton's ineffective assistance of appellate counsel claim).) Accordingly, we consider whether the Michigan court "unreasonably applied that principle to the facts of the case before it." *Dennis*, 354 F.3d at 517. That requires us to determine whether, once a *Strickland* violation is found, "it is possible fairminded jurists could disagree." *Harrington*, 562 U.S. at 102.

Etherton argues that his appellate counsel was constitutionally ineffective for failing to raise any of the five issues raised in his Motion for Relief from Judgment (R-11). We address each in turn.

A

We begin by considering whether the Michigan court unreasonably applied *Strickland* in addressing Etherton's argument that his appellate counsel was constitutionally ineffective for failing to argue that his confrontation rights were violated. The admission of the content of an anonymous tip should have alerted Etherton's appellate counsel as to the presence of a serious Confrontation Clause issue. Many less meritorious issues were raised on direct appeal in this case, which suggests that the failure to raise the issue

was an oversight and not deliberate strategy. *See Smith*, 528 U.S. at 288 ("'[W]hen ignored issues are clearly stronger than those presented, . the presumption of effective assistance of counsel [is] overcome.'") (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)); *Joshua v. DeWitt*, 341 F.3d 430, 441 (6th Cir. 2003); *Roe v. Delo*, 160 F.3d 416, 419 (8th Cir. 1998). In these circumstances, "the ineffectiveness prong of *Strickland* turns on whether an objectively reasonable attorney would have presented the issue for plain error review because it had a reasonable likelihood of success." *Roe*, 160 F.3d at 419. In other words, both prongs of *Strickland* in this case turn on the same issue regarding appellate counsel's failure to present a Confrontation Clause argument: whether there is a reasonable probability that Etherton would have prevailed on appeal if the issue were raised.

As a threshold matter, we note that without a constitutional violation, there would have been no chance of success on appeal. Consequently, we first address whether Etherton's confrontation rights were violated. We then address whether the violation was sufficiently serious such that there was a reasonable probability Etherton would have prevailed on appeal. *Strickland*, 466 U.S. at 694.

1

The Confrontation Clause categorically prohibits the introduction of a certain class of out-of-court statements. *Cf. Crawford v. Washington*, 541 U.S. 36, 54 (2004). There are two necessary and mutually sufficient conditions to identify whether an out-of-court statement implicates the protection of the Confrontation Clause. *See id.* First, the statement

must be testimonial. *Id.* Second, the statement must be introduced for its truth. *See id.*

The Supreme Court stated in *Crawford* that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50. Consequently, the Court held that "[t]he Sixth Amendment must be interpreted with this focus in mind." *Id.* The Court explained that "[t]he text of the Confrontation Clause reflects this focus. It applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Id.* at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). The Court noted that various formulations of what might constitute a testimonial statement existed, *id.* at 51–52, and held—without endorsing any particular formulation—that "[s]tatements taken by police officers in the course of interrogations" are per se testimonial. *Id.* at 52.

Davis v. Washington was the next case that presented the Supreme Court an opportunity to elaborate on what constitutes a testimonial statement. 547 U.S. 813 (2006). *Davis* concerned the admission of a recorded statement made to a 911 operator. *Id.* at 817. The Court carved an exception to its ultimate holding in *Crawford* to mirror the emergency exception to *Miranda* announced in *New York v. Quarles*, 467 U.S. 649, 658–59 (1984). The *Davis* Court held that when the totality of the circumstances objectively indicates that the primary purpose of police interrogation is "to enable police assistance to meet an ongoing emergency,"

statements made in response are not testimonial. 547 U.S. at 828.

Although in both *Crawford* and *Davis*, the Court's holdings applied to statements made in response to police interrogation, the Court made clear that it was not implying that "statements made in the absence of any interrogation are necessarily nontestimonial." *Davis*, 547 U.S. at 822 n.1. In fact, the Court reiterated in *Melendez-Diaz v. Massachusetts* that volunteered testimony can trigger the protections of the Confrontation Clause. 557 U.S. 305, 316–17 (2009). The Court asserted that "'[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.'" *Id.* at 316 (quoting *Davis*, 547 U.S. at 822 n.1); *see also Davis*, 547 U.S. at 822 n.1 (noting that "[p]art of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning"); *Crawford*, 541 U.S. at 51–52 (describing one formulation of testimonial statements as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (internal citations and quotation marks omitted)).

In this case, an anonymous tipster made a formal accusation to government officers. It was therefore testimonial.[2] *See Davis*, 547 U.S. at 824 ("'An accuser

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[2] We had occasion to consider directly whether the content of an anonymous tip is testimonial in *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004). In that case, we held that "statements

who makes a formal statement to government officers bears testimony . . . .'") (quoting *Crawford*, 541 U.S. at 51).

The content of the tip was also admitted into evidence for its truth. It was elicited by the prosecution from three different witnesses during its case-in-chief, and the prosecution emphasized the tip during closing argument: "[T]his is the Audi that was found later in the day that matched the tip, two white males heading from Detroit to Grand Rapids, and coincidently they have a hundred and twenty-five grams of cocaine in the car." (R. 5-4 at PageID 476:8–16.) The prosecutor's repeated references both to the existence and the details of the content of the tip went far beyond what was necessary for background—thereby indicating the content of the tip was admitted for its truth.

Accordingly, it was error to admit the content of the anonymous tip in this case. We now consider whether, if Etherton's appellate counsel had raised

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of a confidential informant are testimonial." *Id.* at 670. We stated in *Cromer* not just that the admission of an anonymous tip was unconstitutional, but further held that "[t]he allowance of anonymous accusations of crime without any opportunity for crossexamination would make a mockery of the Confrontation Clause." *Id.* at 675. Every other circuit court that has considered this issue is in accord. *United States v. Maher*, 454 F.3d 13, 22–23 (1st Cir. 2006); *United States v. Adams*, 628 F.3d 407, 417 (7th Cir. 2010) (finding a Confrontation Clause violation in the admission of a confidential informant's statement to a police officer that stated the defendant "was involved in drugs, had a large amount of money on him[,] was on his way to buy crack, and describ[ing] the car [the defendant] was driving"); *United States v. Holmes*, 620 F.3d 836, 841 (8th Cir. 2010); *United States v. Lopez-Medina*, 596 F.3d 716, 730 (10th Cir. 2010).

the issue on appeal, there would have been a reasonable probability that his appeal would have been successful. *Strickland*, 466 U.S. at 694.

2

On direct appeal, a preserved objection to a federal constitutional violation necessitates reversal unless the error was "'harmless beyond a reasonable doubt.'" *Lilly v. Virginia*, 527 U.S. 116, 139–40 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In contrast, an unpreserved objection to a constitutional violation is subject to a state's procedural forfeiture rules. *See Osborne v. Ohio*, 495 U.S. 103, 122–23 (1990) (finding no constitutional violation when the state court procedurally barred review of an unpreserved objection of a violation of the defendant's due process rights)). Although defense counsel ultimately objected to the tip at trial as hearsay (R. 5-4 at PageID 427:19–21), this did not amount to preservation of a Confrontation Clause objection under clearly established federal law. *See United States v. Hadley*, 431 F.3d 484, 498 (6th Cir. 2005) ("Because Defendant raised only a hearsay objection to these statements at trial, and did not challenge their admissibility on constitutional grounds, our review here is governed by the plain error standard."). Accordingly, we consider whether the Confrontation Clause violation would have been forfeited under Michigan's procedural forfeiture rules.

Michigan's procedural forfeiture rules are modeled on the plain error rule in Rule 52(b) of the Federal Rules of Criminal Procedure as interpreted by the United States Supreme Court in *United States v. Olano*, 507 U.S. 725, 731–34 (1993). *See People v.*

Carines, 597 N.W.2d 130, 138 (Mich. 1999). In Michigan, to avoid forfeiture under its plain error rule, "three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, 597 N.W.2d at 138 (citing *United States v. Olano*, 507 U.S. 725, 731–34 (1993)). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* Once a defendant establishes these requirements, reversal is warranted "when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* (internal quotation marks and alterations omitted).

a

As explained in Part III.A.1, *supra*, Etherton's right to confrontation was violated when the trial court admitted the content of the anonymous tip. Because of the clear, consistent, and voluminous precedent indicating that the admission of the content of the tip violated Etherton's rights, we find that the error was plain.[3] We therefore turn to whether the tip was prejudicial.

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[3] Even before Etherton's judgment became final, appellate courts in Michigan consistently held that statements of anonymous and confidential informants made to police officers are testimonial. *People v. Chambers*, 742 N.W.2d 610, 616 (Mich. Ct. App. 2007) ("A statement by a confidential informant to the authorities generally constitutes a testimonial statement.") (citing *Cromer* at 675); *People v. Montgomery*, No. 269682, 2007

The district court found that the tip did not prejudice Etherton for two reasons: (1) because of "the trial court's jury instruction"; and (2) because of "the overall strength of the prosecutor's case apart from the hearsay testimony." *Etherton v. Rivard*, No. 11 11958, 2014 WL 764843, at *8 (E.D. Mich. Feb. 26, 2014). We respectfully disagree.

The trial court's attempt to issue a curative instruction did nothing to alleviate the prejudice of the tip. The trial court stated that the tip was "not evidence per [se] of the defendant's guilt." (R. 5-4 at PageID 487.) The instruction was vague, and could have been taken by a jury to mean that the tip by itself was not sufficient to find Etherton guilty, but that it could otherwise be considered for its truth. The instruction was therefore not in fact curative.

As to the strength of the prosecutor's case absent the tip, the evidence was underwhelming as to Etherton's knowledge of the presence of the cocaine. The government's case turned almost entirely on the uncorroborated testimony of a codefendant. Although the bag of cocaine was found in the driver's door next to Etherton, the evidence strongly indicated that it would not have been obvious to the driver. The video indicates that it took two officers and a K-9 unit more than ten minutes of searching before the bag was discovered under an empty bag of potato chips. As a

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WL 3085513, at *2 (Mich. Ct. App. Oct. 23, 2007) (same); *People v. Demann*, No. 268657, 2007 WL 2404534, at *4 (Mich. Ct. App. Aug. 23, 2007) (same); *People v. Thompson*, No. 258336, 2007 WL 2051977, at *4 (Mich. Ct. App. July 17, 2007) (same); *People v. Tolbert*, No. 262792, 2006 WL 2924577, at *2 (Mich. Ct. App. Oct. 12, 2006) (same).

result, absent Pollie's incriminating testimony, the evidence that Etherton knew the cocaine was in the car amounted to only the following three facts: (1) the cocaine was well-hidden; (2) Etherton was near the cocaine; and (3) the car belonged to Etherton. On their own, these three facts, especially in light of the presence of another person in the car, would have fallen far short of establishing beyond a reasonable doubt that Etherton had knowledge of the cocaine. *See, e.g., United States v. Newsom*, 452 F.3d 593, 609 (6th Cir. 2006) (holding that a "defendant's mere presence in a car where [contraband] is found and proximity to [contraband] are insufficient proof of constructive possession"—even when the defendant is the only person in a car); *United States v. Campbell*, 549 F.3d 364, 374 (6th Cir. 2008) (holding that "incriminating evidence must supplement a defendant's proximity to [contraband] in order to tip the scale in favor of constructive possession"). Given the prosecutor's heavy reliance on the otherwise uncorroborated testimony of a codefendant to establish *mens rea*, Etherton was vulnerable to being prejudiced by error. *See United States v. Necoechea*, 986 F.2d 1273, 1283 (9th Cir. 1993) ("[A] defendant is more likely to be prejudiced by error or misconduct when the government's case rests on uncorroborated accomplice testimony."), *as amended on denial of reh'g* (Apr. 15, 1993).

Despite this vulnerability, Respondent-Appellee argues that the information contained in the tip did not prejudice Etherton for two reasons. First, Rivard argues the tip is not prejudicial because it is "fully consistent with Etherton's defense that, while there was cocaine in the car, he did not know about it."

Corrected Brief for Respondent-Appellee at 8. Second, he asserts that it caused no prejudice because the tip "stated what was, based on the other evidence presented, an undisputed fact." *Id.* at 9. The Circuit Court for Ionia County found no prejudice resulting from the admission of the tip on just these grounds. (R. 5-12 at PageID 988.)

Both Rivard and the Circuit Court for Ionia County overlook the most prejudicial aspect of the tip in this case: the tip tends to suggest improper inferences precisely because it is consistent with the admitted evidence. The content of the tip that was introduced described: (1) two white men; (2) in a White Audi; (3) driving from Grand Rapids to Detroit and back to Grand Rapids on I-96; and (4) possibly with cocaine in the vehicle. As Respondent-Appellee correctly notes, each element of the tip was ultimately corroborated by largely undisputed evidence. The corroboration, though, does not render the tip harmless. The high-degree of corroboration exacerbates the error. Any jury would be unlikely to view the similarity between the tip and the other evidence at trial as a matter of mere coincidence. As a result, the jury was likely to find the tip reliable, and thereby to draw improper inferences from the tip. For example, the tip's reference to two white men could very well have indicated that both were involved with the possession with intent to deliver the cocaine—an inference that could have been thoroughly examined given the opportunity for cross-examination, which was lacking at trial.

Because much of Pollie's testimony was reflected in the content of the tip that was put before the jury,

the jury could have improperly concluded that Pollie was thereby testifying truthfully—that it was unlikely for it to be a coincidence for his testimony to line up so well with the anonymous accusation.[4]

Absent the tip that may have bolstered Pollie's testimony, there were at least eight significant reasons that the jury had to doubt Pollie. First, Pollie acknowledged that he had received a plea deal to plead to possession of cocaine and serve nine months in jail in exchange for his testimony. (R. 5-4 at PageID 389.) Second, Pollie admitted that he had initially lied to the police and only changed his story when, facing "a lengthy incarceration term," he agreed to a plea deal. (R. 5-4 at PageID 416–17, 419–20.) Third, Pollie stated that he had spent some time in the car on his own while Etherton went into Meijer to cash a check, indicating that Pollie had an opportunity to hide evidence on the driver's side of the car. (R. 5-4 at PageID 403.) Fourth, Pollie admitted that he had eaten chips on the day of the arrest, which demonstrated that the bag on top of the cocaine might have been Pollie's. (*Id.*) Fifth, Pollie acknowledged that he had handled the bag of cocaine and expected his fingerprints to be found on it. (*Id.*) Sixth, although Pollie initially denied driving on the day of the arrest because he did not have a license, he admitted that he had in fact driven a different vehicle earlier that day. (R. 5-4 at PageID 420– 21.) Seventh, Pollie acknowledged that he had both used and dealt cocaine in the past. (R. 5-4 at PageID 406.) Finally, Pollie

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[4] Indeed, in the context of evaluating law enforcement's quantum of suspicion, corroboration renders an anonymous tip more reliable. *See, e.g., Alabama v. White*, 496 U.S. 325, 331 (1990).

disclosed that he had read the police reports concerning both his and Etherton's arrests, indicating an opportunity to fabricate testimony in order to conform to the expected testimony of other witnesses for the prosecution. (R. 5-4 at PageID 416.)

The entire case from opening statement to return of the verdict was less than a day. The proof presented lasted a mere four hours and nineteen minutes. In that time, the prosecution relied on the tip as a critical piece of evidence to support and corroborate the otherwise unsupported testimony of a cooperating co-defendant who admitted to having lied to the police—and to having the opportunity and motive to fabricate. Under the circumstances of this case, it is apparent that the admission of the anonymous tip was prejudicial.

b

Because Etherton has established each of the three conditions stated in *Carines*, we now consider whether the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. We find that there is a reasonable probability that Etherton would have prevailed on this argument on direct review.

People v. Shafier, 768 N.W.2d 305 (Mich. 2009) is particularly instructive, as it was decided less than four months after the Michigan Supreme Court denied Etherton leave to appeal on direct review. In *Shafier*, the prosecutor repeatedly referred to the defendant's post-*Miranda* silence throughout trial, including during closing argument. *Id.* at 315. "[T]he

strength of the prosecutor's overall case against defendant hinged entirely on the jury's assessments of the witnesses' credibility." *Id.* In light of the repeated nature of the error and the involvement of a constitutional right, the Michigan Supreme Court held that "there is no question that this is the sort of error that compromises the fairness, integrity, and truth-seeking function of a jury trial." *Id.* at 316. The Michigan Supreme Court elaborated, stating that the constitutional violation "rendered the trial fundamentally unfair and cast a shadow on the integrity of [Michigan's] judicial processes." *Id.*

This case bears striking similarities to *Shafier*. The constitutional error was made repeatedly throughout Etherton's trial. The prosecutor's case against Etherton hinged entirely on the jury's assessment of the credibility of witness testimony—in this case of one witness with the motive and opportunity to fabricate. Accordingly, there is a reasonable probability that Michigan courts would have found on direct review that the constitutional error in this case seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.

3

Shafier illustrates why an objectively reasonable attorney would have raised this issue for plain-error review, and why there is a reasonable probability that Michigan appellate courts would have found plain error had the issue been raised. Etherton has therefore established that he was denied the right to effective assistance of counsel on his first appeal as of right. Moreover, having considered the arguments

raised by Rivard and relied on by the Michigan courts, we hold that it was an unreasonable application of clearly established Federal law for the Michigan court to hold otherwise. Fairminded jurists could not disagree. Etherton is therefore entitled to a belated appeal on the issue that counsel ineffectively failed to raise.

B

Next, we consider Etherton's argument that he was denied effective assistance of counsel on appeal as a result of appellate counsel's failure to argue ineffective assistance of trial counsel. He argues that appellate counsel should have raised three grounds for ineffective assistance of trial counsel: (1) that trial counsel should have objected to the admission of the content of the anonymous tip on Confrontation Clause grounds; (2) that trial counsel failed to object to improper explanations offered by the prosecution on closing argument; and (3) that defense counsel was unprepared for trial.

We agree with Etherton that appellate counsel should have argued that failure to object to the admission of the content of the anonymous tip constituted ineffective assistance of trial counsel. Because there was a Confrontation Clause violation that resulted in substantial prejudice, there is a reasonable probability that Michigan appellate courts would have found trial counsel constitutionally ineffective. *See* Part III.A.3, *supra*. The failure to include this compelling argument was therefore prejudicial and, in light of the less meritorious arguments raised on appeal, amounted to deficient performance of appellate counsel. *See id.* For the

reasons stated above, we find that it was an unreasonable application of Federal law to hold otherwise. Consequently, we hold that Etherton is also entitled to a belated appeal on this issue.

Etherton's second argument, however, is unpersuasive. Minor improprieties in a prosecutor's closing argument can be corrected "by instructing the jury that closing arguments are not evidence." *United States v. Crosgrove*, 637 F.3d 646, 664 (6th Cir. 2011). The trial court instructed the jury in this case that "[t]he lawyer[s'] statements and arguments are . . . not evidence." (R. 5-4 at PageID 486.) There was therefore no prejudice—and thus no ineffective assistance—due to trial counsel's failure to object to the closing argument.

Finally, Etherton's third argument is inconsistent with the record. Appellate counsel in fact argued that trial counsel was ineffective as a result of being unprepared. Accordingly, there was no ineffective assistance of counsel due to any *failure* to make such an argument.

C

We now turn to the remaining three issues that Etherton argues should have been raised by his appellate counsel: (1) that the prosecutor improperly explained on closing argument why he had given a plea deal to the codefendant but not Etherton; (2) that the prosecutor acted improperly in closing argument by vouching for Pollie's credibility; and (3) that the prosecution elicited false testimony. None of these arguments are persuasive.

First, as noted in Part III.B, *supra*, there was no prejudice as a result of the prosecution's explanations offered during closing argument. Appellate counsel was therefore not ineffective in not raising it.

Second, for similar reasons, we find no ineffectiveness in appellate counsel's failure to argue that the prosecution improperly vouched for Pollie's credibility. As the district court correctly noted, any comments that improperly bolstered Pollie's "were not extensive." *Etherton*, 2014 WL 764843, at *10. Any minor improprieties that may have resulted from the prosecution's comments as to Pollie's testimony were thus corrected by the trial court's jury instructions that lawyers' statements are not evidence. Accordingly, appellate counsel was not ineffective in choosing not to argue this issue.

Finally, we find that appellate counsel was not ineffective in failing to argue that the prosecution introduced false testimony about the rate at which fingerprints are found on plastic bags. In order to establish a denial of due process as a result of the introduction of false testimony, a petitioner must show: "(1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *Brooks v. Tennessee*, 626 F.3d 878, 894–95 (6th Cir. 2010) (quoting *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998)). Even assuming the evidence was material and false, Etherton has put forward no evidence or argument at any stage of the proceedings that the prosecution knew it was false. Etherton has therefore not established reasonable probability of success as to this argument, and his appellate counsel was thus not ineffective in failing to argue it.

D

Although Etherton has established a violation of clearly established federal law sufficient for relief under § 2254, that relief is circumscribed by the nature of the error and "AEDPA's purpose to further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). When a federal court grants a petition under § 2254 for ineffective assistance of appellate counsel, the petitioner is entitled only to have the opportunity for the state courts to review the merits of the claims that appellate counsel ineffectively failed to raise, consistent with the substantive and procedural rules of the state and the requirements of the United States Constitution. *See Mapes v. Tate*, 388 F.3d 187, 194 (6th Cir. 2004); *see also Payne v. Stansberry*, 760 F.3d 10, 18 (D.C. Cir. 2014); *Shaw v. Wilson*, 721 F.3d 908, 919 (7th Cir. 2013), *cert. denied sub nom. Brown v. Shaw*, 134 S. Ct. 2818, 189 L. Ed. 2d 785 (2014). "This remedy avoids unnecessarily interfering with [the State's] interest in correcting its own errors." *Mapes*, 388 F.3d at 194. Accordingly, we hold that Etherton is entitled to have Michigan courts consider the issues that, absent the ineffective assistance of appellate counsel, would have been raised on direct appeal.

IV

For the foregoing reasons, the judgment of the district court is **AFFIRMED IN PART** and **REVERSED IN PART**. The case is **REMANDED** with directions to issue a writ of habeas corpus unless, within whatever reasonable period of time the district court deems appropriate, Etherton is afforded a new appeal in which he may raise the Confrontation

Clause and ineffective assistance of trial counsel arguments omitted from his original direct appeal or, in the alternative, is granted a new trial.

DISSENT

KETHLEDGE, Circuit Judge, dissenting. The problem with the majority opinion is not that it misapplies the habeas standard, but that it fails to apply that standard at all. The opinion nowhere gives deference to the state courts, nowhere explains why their application of *Strickland* was unreasonable rather than merely (in the majority's view) incorrect, and nowhere explains why fairminded jurists could view Etherton's claim only the same way the majority does. The opinion, in other words, does exactly what the Supreme Court has repeatedly told us not to do.

I grant that one could argue the merits of Etherton's *Strickland* claim both ways, though personally I have a hard time seeing the putative prejudice upon which the majority rests its decision. The issue at trial was whether the cocaine in Etherton's Audi belonged to him or to Pollie. Had the tip taken a position on that issue—had it included, for example, some suggestion that Etherton purchased the cocaine before picking up Pollie—then Etherton would have had a solid argument as to prejudice. But in fact the tip was agnostic as to whom the cocaine belonged: it relayed only that two white men would be travelling down I-96 in a white Audi containing cocaine. All of those facts were consistent with

Etherton's defense. All of them, indeed, were undisputed. One may therefore ask why a "fairminded jurist," *Harrington v. Richter*, 562 U.S. 86, 102 (2011), could conclude *only* that the tip was so prejudicial that Etherton's counsel in state court was constitutionally required to make eight arguments on appeal rather than six.

The majority does not answer that question—its analysis sticks to *Strickland* rather than *Harrington*—but it does try to make out a case for prejudice *simpliciter*. The argument boils down to this: the tip was prejudicial precisely because all of the information contained in it was already common ground at trial. Specifically, since all of the tip's information was undisputed at trial, and because Pollie's testimony included (among many other things) that same information, the tip tended to bolster Pollie's credibility at trial. If Pollie was right about the color of the Audi and the interstate number and the fact that cocaine was in the car, the argument seems to go, maybe a juror would think he was right about who possessed the cocaine too. That argument is creative—in the sense that making do with the ingredients on hand is often creative—but it is hardly constitutionally required. Meanwhile, the cocaine was found in a driver's-door compartment only inches away from Etherton in a car that he owned and was driving at the time. That the cocaine was found under an empty bag of potato chips—as opposed to lying in plain view by the time the officers approached—does not help Etherton's case much. In short, a fairminded jurist could conclude, as the state court concluded, that Etherton had bigger problems at trial than the tip.

Too often in habeas cases the petitioner's brief, or an opinion granting the writ, read just like they would in a direct appeal. The court's opinion here illustrates the point. Respectfully, it takes more to apply the fairminded-jurist standard than to perform a direct-review analysis and then simply announce that "[f]airminded jurists could not disagree." Maj. Op. at 20. What it takes, rather, is a willingness to take seriously the arguments that supported or "could have supported" the state-court decision, *Harrington*, 562 U.S. at 102; and then to ask not merely whether we agree with those arguments, but whether they are coherent and grounded enough in the facts and applicable law that an unbiased jurist could agree with them. *See, e.g., Drummond v. Houk*, ___ F.3d ___, 2015 WL 4774940 at *2-3 (6th Cir. 2015). But we have none of that here.

In sum, the governing Supreme Court precedent in this case is not *Strickland* but *Harrington*. One passage in particular: "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)." *Harrington*, 562 U.S. at 105. Our decision today falls prey to that danger, and thus I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY ETHERTON,

Petitioner,

v. CASE NO. 11 11958
HONORABLE ARTHUR J. TARNOW

STEVEN RIVARD,

Respondent.
_____/

OPINION AND ORDER DENYING THE PETITION FOR WRIT OF HABEAS CORPUS BUT GRANTING IN PART A CERTIFICATE OF APPEALABILITY

Pending before the Court is petitioner Timothy Etherton's habeas corpus petition, which challenges his Ionia County conviction for possession with intent to deliver 50 to 449 grams of cocaine. Petitioner alleges that certain hearsay testimony deprived him of his right of confrontation, that the prosecutor elicited false testimony and made an improper closing argument, that the trial court's refusal to adjourn the trial was arbitrary and capricious, and that his trial and appellate attorneys were ineffective. Respondent Steven Rivard urges the Court to deny the petition on grounds that Petitioner's claims are procedurally defaulted and/or meritless. The Court has determined that the state courts' decisions on Petitioner's claims were objectively reasonable and, therefore, Petitioner

is not entitled to habeas corpus relief. The specific reasons for this conclusion and a procedural history of the case follow.

I. BACKGROUND

A. The Facts

Petitioner was charged with possession with intent to deliver at least 50, but less than 450, grams of cocaine. He was tried before a jury in Ionia County Circuit Court on February 15, 2007 Michigan State Trooper Trevin Antcliff testified that, on November 22, 2006, he and several other officers were conducting drug interdiction on the expressway in Ionia County. About 3:30 p.m., he stopped a white Audi because the car was speeding and he had been advised to be on the lookout for two white males possibly carrying cocaine in a white Audi on a round trip between Grand Rapids and Detroit. Petitioner was driving the car, and he indicated that it was his car.

Based on the anonymous tip about two men in a white Audi possibly carrying cocaine, Trooper Antcliff asked Petitioner whether there was anything illegal in the car. Petitioner told him, "No," but when Trooper Antcliff asked Petitioner whether he could search the car, Petitioner said, "I don't know why you'd want to do that." Trooper Antcliff responded by asking Petitioner if he was denying the trooper the right to do his job. Petitioner replied, "If you want to search the car, go ahead."

A K-9 officer then responded to the scene and searched the vehicle, but did not find anything of

significance. Another officer, however, searched the vehicle and found approximately four ounces of cocaine. Trooper Antcliff subsequently arrested Petitioner and his passenger (Ryan Pollie) for possession with intent to deliver cocaine.

Newaygo County Deputy Sheriff Adam Mercer testified that he also participated in the traffic stop on I-96 on November 22, 2006. He explained that the officers had received a tip about two white males traveling from Grand Rapids to Detroit in a white Audi about 10:00 a.m. that day to pick up drugs and returning to Grand Rapids the same afternoon. Following the traffic stop, Deputy Mercer made contact with both the driver and the passenger in the vehicle. And, after the police dog failed to make any positive hits, he (Mercer) conducted a search and found cocaine in the map compartment of the driver's door under an empty bag of potato chips. The cocaine was in a clear plastic baggie. It weighed 124.3 grams or approximately four and a half ounces, which, in his opinion, was a very large amount of cocaine. The bag was testified for fingerprints, but no prints were found on the bag.

Keith Szyniszewski testified that he worked in the drug analysis unit of the Michigan State Police Forensic Science Division. He analyzed the white powder in evidence and determined that it consisted of 125.2 grams of pure cocaine.

Sergeant Charlie Noll of the Ionia County Sheriff's Office interviewed Petitioner after advising him of his constitutional rights. Petitioner told him that he had left Grand Rapids about 10:00 a.m. and had traveled to the Detroit area with Mr. Pollie as his

passenger. They went to see his former sister-in-law and nephew who were planning to visit Petitioner's parents in Virginia. Once there, the relatives asked him to take them to the airport. He did that and then returned to Grand Rapids, as he was unable to go to Virginia. At no time did he and Mr. Pollie separate, and he did not know how the drugs got in his car. He did not think that Mr. Pollie planted them there.

Ryan Pollie testified that he was charged with the same crime as Petitioner, but subsequently pleaded guilty to possession of less than twenty-five grams of cocaine. He explained that he was serving a sentence of nine months in jail in return for his truthful testimony against Petitioner. Pollie claimed that, on the day in question, he went to Detroit with Petitioner. Their plan was to take some of Petitioner's relatives to the airport. Petitioner dropped him off at a restaurant where he waited for thirty to forty-five minutes while Petitioner supposedly took his relatives to the airport. On their subsequent ride home, Petitioner showed him a package of cocaine and told him that he got the cocaine from a man down the road from where Pollie had waited for him. Petitioner had said that he could sell some of the cocaine and use the money to pay for the cocaine. When they realized that they were being pulled over, Petitioner handed the cocaine to him and suggested that he put the cocaine in the glove compartment. He refused to hide the cocaine and returned it to Petitioner who placed it either in his lap or in the door.

Detective Sergeant Joel Abendroth of the Michigan State Police testified that he was the supervisor of the officers who testified earlier in the

trial. He stated that the police had received a very specific tip from an anonymous caller on November 22, 2006. The tipster had said that two white males would be traveling along I-96 in a white Audi. The tip was specific as to the time when the men would be leaving Grand Rapids and the approximate time when they would be returning to Grand Rapids.

At the crime scene, Petitioner told him that he was going to Detroit to pick up his relatives and take them to the airport. Petitioner also said that he had no idea how the drugs got in his car and that Mr. Pollie could not have put them there because they were together the entire time.

Sergeant Abendroth stated that the brick of cocaine in evidence was one hundred percent pure cocaine and, in his opinion, the purity and amount of cocaine suggested that it was not for personal use. He thought it was worth at least $5,000. He arranged to have the bag containing the cocaine tested for fingerprints, but no prints were found on the bag. According to him, it is very uncommon to find fingerprints on bags, but they sent the bag for testing anyway to avoid having defense counsel question him about not testing the bag.

Petitioner did not testify or present any witnesses. His defense was that the prosecution failed to prove that he knew the cocaine was in his car and that he intended to sell it. He also maintained that the prosecution had bought the incriminating testimony of his co-defendant.

B. The Verdict, Sentence, Motion for New Trial, Direct Appeal, and Collateral Proceedings

The trial court instructed the jury on the charged offense and on the lesser offense of possession of 50 to 449 grams of cocaine. The jury found Petitioner guilty, as charged, of possession with intent to deliver at least 50, but less than 450, grams of cocaine. *See* Mich. Comp. Laws § 333.7401(2)(a)(iii). On April 10, 2007, the trial court sentenced Petitioner as a fourth habitual offender to imprisonment for twenty to forty years.

Petitioner moved for a new trial on grounds that (1) the trial court erroneously denied his motion to adjourn the trial and (2) trial counsel was unprepared for trial because she did not know about a witness who could have testified in Petitioner's behalf. The trial court held an evidentiary hearing on Petitioner's motion and then denied the motion.

In a subsequent appeal of right, Petitioner argued that: (1) the trial court abused its discretion by denying his request for an adjournment of the trial; (2) trial counsel was not prepared for trial and did not interview a material witness; (3) Dan Clayton's testimony at the evidentiary hearing was newly discovered evidence which entitled him to a new trial; (4) the trial court erred in denying his motion to suppress evidence; (5) the trial court improperly substituted its judgment for the jury's judgment when evaluating the newly discovered evidence; and (6) his sentence was improperly enhanced on the basis of factual findings not found by the jury beyond a reasonable doubt. The Michigan Court of Appeals found no merit in these claims and affirmed

Petitioner's conviction in an unpublished, *per curiam* opinion. *See People v. Etherton*, No. 277459 (Mich. Ct. App. Oct. 16, 2008). Petitioner raised the same claims in the Michigan Supreme Court, which denied leave to appeal because it was not persuaded to review the issues. *See People v. Etherton*, 483 Mich. 896; 760 N.W.2d 472 (2009) (table).

On November 13, 2009, Petitioner filed a motion for relief from judgment in which he raised several issues about the prosecutor, trial counsel, and appellate counsel. These claims now form habeas claims one, two, three, four, six, and seven of the habeas corpus petition. The trial court denied Petitioner's motion for relief from judgment after concluding that Petitioner had not demonstrated "good cause" under Michigan Court Rule 6.508(D)(3) for the failure to raise his claims on appeal, nor "actual prejudice" from the alleged irregularities supporting his claims for relief.

Petitioner appealed the trial court's decision, but the Michigan Court of Appeals denied leave to appeal for failure to establish entitlement to relief under Rule 6.508(D). *See People v. Etherton*, No. 295566 (Mich. Ct. App. Mar. 31, 2010). On October 26, 2010, the Michigan Supreme Court denied leave to appeal for the same reason. *See People v. Etherton*, 488 Mich. 911; 789 N.W.2d 478 (2010) (table).[1]

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[1] Supreme Court Justice Alton Thomas Davis recused himself because he sat on the Court of Appeals panel.

C. The Habeas Petition and Responsive Pleading

On May 4, 2011, Petitioner filed his habeas corpus petition through counsel. He argues that:

I. Police testimony repeating what unnamed people told them linking Petitioner to drug dealing was unfairly prejudicial and a denial of the constitutional right of confrontation.

II. The prosecutor in closing argument acted improperly by giving the jury his reasons for giving a plea bargain deal to the codefendant but not Petitioner Etherton, and for taking other actions, which was prejudicial and a denial of the constitutional right of confrontation.

III. The prosecutor in closing argument acted improperly by repeatedly vouching for the credibility of prosecution witness Ryan Pollie.

IV The prosecution presented testimony by a police witness that was untrue, requiring a new trial.

V. The denial of a brief adjournment to permit defense counsel to interview a witness in the local county jail was unreasonable and denied Petitioner the due process right to present a defense with witnesses.

VI. Failures to object and other shortcomings amounted to ineffective assistance of counsel.

VII. Petitioner was prejudiced by ineffective assistance of counsel on appeal.

Respondent asserts that all of these claims except claim five (denial of an adjournment) are procedurally defaulted because Petitioner did not raise claims one through four and six through seven on direct appeal and because the state courts denied relief under Michigan Court Rule 6.508(D)(3). Rule 6.508(D)(3) prohibits state courts from granting relief from judgment if a defendant could have raised his claims on appeal from his judgment or sentence unless the defendant shows cause for his failure to raise the claim earlier and prejudice from the alleged irregularities. The rule is an adequate and independent ground for foreclosing habeas review of a petitioner's claim if the last state court to adjudicate the petitioner's claims in a reasoned opinion unambiguously relied on the rule to deny relief. *Peoples v. Lafler*, 734 F.3d 503, 510-12 (6th Cir. 2013). Petitioner's claims, however, lack substantive merit, and a determination of whether the claims are procedurally defaulted under a cause-and-prejudice analysis "adds nothing but complexity to the case." *Babick v. Berghuis*, 620 F.3d 571, 576 (6th Cir. 2010). The Court therefore "cut[s] to the merits," *id.*, using the following standard of review.

II. STANDARD OF REVIEW

"The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is

provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)." *Harrington v. Richter*, __ U.S. __, __, 131 S. Ct. 770, 783 (2011). Pursuant to § 2254, the court may not grant a state prisoner's application for the writ of habeas corpus unless the state court's adjudication of the prisoner's claims on the merits

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

> Under the "contrary to" clause [of § 2254(d)(1)], a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause [of § 2254(d)(1)], a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies

> that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (O'Connor, J., opinion of the Court for Part II).

"[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

"AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997), and 'demands that state-court decisions be given the benefit of the doubt,' *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)." *Renico v. Lett*, 559 U.S. 766, 773 (2010). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 131 S. Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). To obtain a writ of habeas corpus from a federal court, a state prisoner must show that the state court's ruling on his or her claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87.

III. DISCUSSION

A. Hearsay Testimony and the Confrontation Clause

Petitioner alleges that the hearsay testimony of several police officers was prejudicial and deprived him of his constitutional right to confront the witnesses against him. The hearsay consisted of the officers' testimony that law enforcement officials had received a tip about two white men, possibly carrying cocaine, going to Detroit and returning to Grand Rapids in a white Audi on November 22, 2006. The tipster did not testify at trial, and Petitioner argues that, because the officers' reason for stopping the car was not something the jury was required to decide, the only purpose in eliciting the testimony was to prejudice him.

Whether the disputed testimony was inadmissible hearsay under the Michigan Rules of Evidence is inconsequential because "federal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). "[A] federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). The federal constitutional issue is whether Petitioner's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated.

1. Clearly Established Federal Law

The Confrontation Clause is applicable to the States through the Fourteenth Amendment," *Idaho v.*

Wright, 497 U.S. 805, 813 (1990), and it guarantees defendants in criminal prosecutions "the right to be confronted with the witnesses against [them]." U.S. CONST. amend. VI. "The Amendment contemplates that a witness who makes testimonial statements admitted against a defendant will ordinarily be present at trial for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him." *Giles v. California*, 554 U.S. 353, 358 (2008) (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)). In other words, "[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59. The Supreme Court has stated that the term "testimonial" "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68; *see also Davis v. Washington*, 547 U.S. 813, 822 (2006) (explaining that statements in response to police interrogations are testimonial when the circumstances objectively indicate that there was no ongoing emergency, and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution").

Following *Crawford*, the United States Court of Appeals for the Sixth Circuit defined the proper inquiry as "whether the declarant intends to bear testimony against the accused." *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004). This intent "may be determined by querying whether a reasonable person in the declarant's position would

anticipate his statement being used against the accused in investigating and prosecuting the crime." *Id.* Statements of a confidential informant are testimonial because "[t]ips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial." *Id.* Pursuant to *Cromer*, the tip to law enforcement officials in this case is deemed testimonial.

The Confrontation Clause, however, "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9. The next question then is whether the disputed hearsay testimony in this case was offered for the truth of the matter.

Testimony about the tip explained why law enforcement officers conducted drug interdiction on a particular expressway on the date and time in question and why they stopped Petitioner. Out-of-court statements that do not go to the very heart of the prosecution's case, but merely provide background information as to why the police took the action they did, are not offered to establish the truth of the matter asserted. *United States v. Deitz*, 577 F.3d 672, 683-84 (6th Cir. 2009). And the Confrontation Clause does not apply to statements that were not offered to establish the truth of the matter asserted. *Cromer*, 389 F.3d at 676.

One could argue, however, that the prosecution was using the officers' hearsay testimony to show more than the reason for the officers' investigation or the effect of the out-of-court statement on the officers. The prosecutor appears to have elicited the testimony,

at least in part, to show that someone had implicated Petitioner in the crime. Detective Mercer, for example, testified that the tipster had said two white males, possibly carrying cocaine, would be traveling from Grand Rapids to Detroit and back to Grand Rapids in a white Audi. (Trial Tr., 77, Feb. 15, 2007.) And Sergeant Abendroth testified that the tipster provided very specific information about the vehicle, the gender and race of the occupants, the time frame for the individuals' departure and return, and the route of travel. (*Id.* at 188.) Petitioner and Ryan Pollie apparently fit this description. The Court therefore will assume the hearsay was offered at least in part to prove the truth of the matter asserted: that the tipster had implicated Petitioner and Ryan Pollie, or someone matching their description, in illegal drug activity. And because Petitioner had no opportunity to cross-examine the tipster, his right of confrontation was violated. The remaining question is whether the alleged violation of Petitioner's right of confrontation was harmless error.

2. Harmless Error Analysis

Violations of the Confrontation Clause are subject to harmless-error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Vasquez v. Jones*, 496 F.3d 564, 574 (6th Cir. 2007). A constitutional error is harmless unless it had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence

in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Whether a violation of the Confrontation Clause was harmless error depends on a number of factors, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684 .

The tipster's statement to the police was not cumulative evidence, but it also was not essential to the prosecution's case. Moreover, there was substantial evidence suggesting that Petitioner was guilty as charged. The police officers' testimony at trial established that Petitioner owned the car he was driving and was seated next to a brick of cocaine when the officers stopped him. He apparently hesitated when Trooper Trevin Antcliff asked him for permission to search the car and said, "I don't know why you'd want to do that." (Trial Tr., 81, Feb. 15, 2007.) A videotape of the traffic stop, which the jurors viewed, apparently also demonstrated that Petitioner initially did not want the police to search his car. (*Id.* at 213-14.) The failure to give consent, alone, is not enough to make the error harmless. And the story he gave to the arresting officers varied from what Ryan Pollie told the officers at the scene. (*Id.* at 112.)

Pollie, moreover, testified that Petitioner had showed him the cocaine in the car on the return trip

to Grand Rapids and told him how he acquired it. Pollie's testimony about his own guilty plea and the fact that he thought it was unfair to be charged with possessing the cocaine was strong evidence that Petitioner jointly possessed the cocaine. And testimony from other witnesses that the brick of cocaine was pure cocaine and more than what a mere user would possess was substantial evidence that Petitioner possessed the cocaine with intent to deliver it.

Furthermore, the trial court specifically instructed the jurors that testimony regarding the tip given to law enforcement officials was not evidence and that the testimony was admitted to demonstrate why the police did what they did. The trial court emphasized that the tip was not *per se* evidence of Petitioner's guilt. (*Id.* at 248.)

In light of the trial court's jury instruction and the overall strength of the prosecutor's case apart from the hearsay testimony, the alleged error could not have had a substantial and injurious effect or influence on the jury's verdict and was harmless. Petitioner therefore has no right to habeas corpus relief on the basis of his first claim.

B. The Prosecutor's Closing Argument

Petitioner alleges that the prosecutor acted improperly during closing arguments by (1) stating his reasons for (a) offering a plea bargain to Ryan Pollie and (b) not calling certain witnesses and (2) vouching for Ryan Pollie's credibility. Petitioner contends that the prosecutor's comments diverted the

jury's attention to the prosecution's conduct and were unrelated to anything the jury was required to decide.

1. Clearly Established Federal Law

Although prosecutors "may strike hard blows," they are "not at liberty to strike foul ones. It is as much [their] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935). Nevertheless, "[c]laims of prosecutorial misconduct are reviewed deferentially on habeas review." *Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004) (citing *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003)). A reviewing court may grant relief only when the prosecutor infringes on specific provisions of the Bill of Rights or infects the trial with such unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). To prevail on his claim, Petitioner must show that the prosecutor's conduct was so egregious "as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher*, 602 F.2d 117, 119 (6th Cir. 1979). Federal courts in this Circuit

> apply a "two-part test to determine whether the state court reasonably applied the federal standard in holding that prosecutorial misconduct did not render [the petitioner's] trial fundamentally unfair." *Irick v. Bell*, 565 F.3d 315, 324 (6th Cir. 2009). [Courts] first determine whether the prosecution's conduct was improper. *Id.* Second, [courts] determine whether that improper conduct was flagrant by considering four factors: "(1) whether the

> evidence against the defendant was strong; (2) whether the conduct of the prosecution tended to mislead the jury or prejudice the defendant; (3) whether the conduct or remarks were isolated or extensive; and (4) whether the remarks were made deliberately or accidentally." *Id.* (internal quotation marks omitted).

Wogenstahl v. Mitchell, 668 F.3d 307, 328 (6th Cir.), *cert. denied sub nom Wogenstahl v. Robinson*, __ U.S. __, 133 S. Ct. 311 (2012).

2. The Prosecutor's Explanations

Petitioner alleges that the prosecutor became a witness and argued facts not in evidence during closing arguments. Specifically, Petitioner claims that the prosecutor improperly informed the jury of his reasons for (1) offering a plea bargain to Petitioner's co-defendant, Ryan Pollie, but not to Petitioner and (2) not calling certain witnesses. Petitioner contends that the prosecutor's comments were improper because there was no testimony about the prosecutor's decision-making process.

While it is true that prosecutors must refrain from asserting facts never admitted in evidence, *Washington v. Hofbauer*, 228 F.3d 689, 700 (6th Cir. 2000), the prosecutor elicited testimony on direct examination of Ryan Pollie that Pollie had pleaded guilty to possessing under twenty-five grams of cocaine pursuant to a deal offered him by the prosecutor's office. (Trial Tr., 15, Feb. 150, 2007.) On cross-examination, defense counsel also elicited testimony that Pollie had been charged with the same

crime as Petitioner, but had pleaded guilty to a reduced crime and was expecting a lesser sentence. (*Id.* at 169-70.) And, on re-direct examination, the prosecutor elicited testimony that he and Pollie's attorney had reached a deal and that Pollie had pleaded guilty even though Pollie did not consider that to be very fair. (*Id.* at 177-79.)

In his closing argument, the prosecutor stated that, although both Petitioner and Ryan Pollie were both charged with the same crime, the prosecutor's office had the authority "to cut deals with bad guys " (*Id.* at 216.) The prosecutor went on to say that Pollie's attorney worked out a deal for Pollie and that there was nothing wrong with doing that and nothing unusual about offering a deal to one of two co-defendants. The prosecutor also said that the reason why one defendant got a deal and the other defendant did not, depended on the facts of the case and that, in this case, Pollie was "the first one at the trough" and therefore "eats best." (*Id.* at 218.) This argument was proper because it was tied to evidence that had already been introduced. *Wogenstahl*, 668 F.3d at 331.

As for not calling certain witnesses, the prosecutor stated in his rebuttal argument that he did not call the dog handler and fingerprint analyst as witnesses because it would have been a waste of time to do so. (Trial Tr., 236-37, Feb. 15, 2007.) This was a direct response to defense counsel's rhetorical question during closing arguments as to why the prosecution did not call the dog handler or the lab technician. (*Id.* at 229-30.)

A "prosecutor is ordinarily entitled to wide latitude in rebuttal argument and may fairly respond

to arguments made by defense counsel." *Angel v. Overberg*, 682 F.2d 605, 607-08 (6th Cir. 1982) (citing *DeChristoforo*, 416 U.S. at 637). The prosecutor's rebuttal argument was a fair response to defense counsel's argument, because witnesses had already testified that the drug-sniffing dog had not detected cocaine during a search of Petitioner's car and that no fingerprints were found on the plastic bag containing the cocaine.

The trial court, moreover, instructed the jurors at the beginning of the case (Trial Tr., 64, Feb. 15, 2007) and at the close of the case (*id.* at 247-48) that the attorneys' statements and arguments were not evidence, but were meant to help the jurors understand the evidence and the way each side viewed the case. The court cautioned the jurors to base their verdict only on the properly admitted evidence. A trial court can correct improprieties in a prosecutor's closing argument "by instructing the jury that closing arguments are not evidence." *United States v. Crosgrove*, 637 F.3d 646, 664 (6th Cir. 2011) (citing *United States v. Emuegbunam*, 268 F.3d 377, 406 (6th Cir. 2001)). Therefore, even assuming the prosecutor's comments were improper, they were not flagrant and did not render the trial fundamentally unfair.

3. Vouching

Petitioner claims that the prosecutor vouched for prosecution witness Ryan Pollie when he stated during closing arguments that Pollie "was incredibly frank" with the jurors and "incredibly honest" when describing what happened on November 22, 2006. (Trial Tr., 217, Feb. 15, 2007.)

"A prosecutor should not give his own opinion as to the credibility of [a] witness." *West v. Bell*, 550 F.3d 542, 565 (6th Cir. 2008) (citing *Hodge v. Hurley*, 426 F.3d 368, 378-79 (6th Cir.2005)). A

> prosecutor's vouching for the credibility of witnesses . . . pose[s] two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

United States v. Young, 470 U.S. 1, 18-19 (1985).

The disputed comments in this case were blunt comments about Pollie's honesty. Nevertheless, testimony that the police discovered a brick of cocaine in the pocket of the car door where Petitioner was seated and that Petitioner admitted to owning the car was strong evidence of Petitioner's guilt. And even though the prosecutor's remarks were deliberately made, they were not extensive. Further, the trial court instructed the jurors to base their decision only on the admissible evidence and that the attorneys' arguments were not evidence. The Court therefore concludes that, although the prosecutor's comments about Pollie being honest and frank were improper, the impropriety was not flagrant. Petitioner has no

right to relief on the basis of the prosecutor's alleged vouching.

C. Alleged Perjury

Petitioner alleges next that he is entitled to a new trial because the prosecutor elicited untrue testimony from a police officer. The allegedly false testimony came from Sergeant Joel Abendroth who testified about fingerprint evidence and the nature of plastic baggies.

The trial court adjudicated and rejected this claim in its opinion denying Petitioner's motion for relief from judgment. The court stated that, "contrary to defendant's position, countering positions by expert witnesses is not necessarily equivalent to perjury."

1. Clearly Established Federal Law

Perjury is "false testimony [under oath or affirmation] concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). Prosecutors, as representatives of the state, may not deceive a court and jurors by eliciting false evidence or by allowing false testimony to go uncorrected when it appears. *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103

(1976) (footnote omitted). The United States Court of Appeals for the Sixth Circuit has

> fashioned a three-part test for determining whether there was a denial of due process through the use of false testimony:
>
> > In order to establish prosecutorial misconduct or denial of due process, the defendants must show (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false. The burden is on the defendants to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony.
>
> *Brooks* [*v. Tennessee*, 626 F.3d 878, 894-95 (6th Cir. 2010)] (quoting *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir.1998)). Testimony is material only if there is a reasonable likelihood that it affected the judgment of the jury. *Id.* at 895.

Peoples v. Lafler, 734 F.3d at 515-16.

2. Application

The disputed testimony in this case was Detective Sergeant Joel Abendroth's testimony that plastic bags are porous and that it is very uncommon to detect fingerprints on plastic bags. Detective Abendroth stated that he found fingerprints on plastic bags less

than five times in over 1600 investigations. (Trial Tr., 196-97, Feb. 15, 2007.) After trial, Petitioner obtained an affidavit from Michael J. Sinke, a former latent print analyst for the Michigan State Police. Mr. Sinke asserts in his affidavit that plastic bags are non-porous and that, during his forensic career, he obtained latent prints from plastic bags approximately 50% of the time.

Sergeant Abendroth's testimony about plastic bags being porous may have been incorrect, but he admitted at trial that he was not a fingerprint expert (*id.* at 197), and it is clear from his testimony that he was merely speaking from his own experience. Thus, Petitioner has failed to show that Abendroth willfully provided false testimony.

Furthermore, whether plastic bags are porous or not conducive to detecting fingerprints was not material evidence. Finally, there is no reason to believe that the prosecutor knew Detective Abendroth's testimony was false. For these reasons, Petitioner has failed to show that the prosecutor elicited or promoted false testimony.

D. The Trial Court's Refusal to Adjourn the Trial

Petitioner's trial attorney requested an adjournment of the trial at the conclusion of *voir dire.* The trial court denied the request, and the trial proceeded. Petitioner claims that the trial court unreasonably and arbitrarily denied his request for a short adjournment of his trial and thereby deprived him of his right to due process of law and his right to present a defense. According to Petitioner, if the trial court had adjourned the trial, his attorney could have

interviewed a jail detainee named Dan Clayton who claimed that Ryan Pollie had stated in jail that the cocaine in question belonged to him and not to Petitioner. The Michigan Court of Appeals adjudicated this claim on direct appeal and stated that the trial court properly denied the motion to adjourn.

1. Clearly Established Federal Law

Denial of a continuance rises to the level of a constitutional violation only when there is "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'. . " *Morris v. Slappy*, 461 U.S. 1, 11–12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)); *see Ungar*, 376 U.S. at 591, 84 S.Ct. 841 ("These matters are, of course, arguable, and other judges in other courts might well grant a continuance in these circumstances. But the fact that something is arguable does not make it unconstitutional."). The circumstances of a particular case determine whether the denial of a continuance is so arbitrary as to violate due process. *Ungar*, 376 U.S. at 589, 84 S.Ct. 841 ("There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."). A defendant must also show that the denial of a

> continuance actually prejudiced his or her defense. *Powell v. Collins*, 332 F.3d 376, 396 (6th Cir. 2003) ("Actual prejudice may be demonstrated by showing that additional time would have made relevant witnesses available or otherwise benefit[t]ed the defense.").

Burton v. Renico, 391 F.3d 764, 772 (6th Cir. 2004).

2. Application

Immediately after *voir dire* on the day of trial, defense counsel asked for an adjournment. Although she stated that she and Petitioner did not have an opportunity to prepare for trial to their satisfaction, she said nothing about wanting to interview Dan Clayton or any other witness. The basis for her motion was a desire to file an interlocutory appeal from the trial court's denial of her motion to suppress evidence of the cocaine found in Petitioner's car. Defense counsel also stated that they would like to order a transcript of the motion hearing for potential impeachment purposes, should they be unsuccessful in appealing the denial of the motion to suppress evidence. (Trial Tr., 51- 54, Feb. 15, 2007.)

The trial court declined to grant either an adjournment or a stay, noting that the trial date had been set almost two months earlier and that Petitioner was unlikely to prevail on appeal because he was "an experienced defendant" and clearly consented to the search. The court opined that both sides were given a full opportunity to prepare for trial and that both attorneys were competent and experienced attorneys who could ably try the case.

The court concluded that there was no basis for adjourning the case. (*Id.* at 54-55.)

Given the fact that defense counsel requested an adjournment to file an interlocutory appeal which had questionable merit and the fact that counsel said nothing about the need to interview witnesses, the trial court's denial of an adjournment was not arbitrary or capricious. The denial of an adjournment certainly did not rise to the level of a denial of due process.

While it is true that defense counsel stated in her oral motion to adjourn the trial that she and Petitioner did not have an opportunity to prepare for trial to their satisfaction, the basis for that statement was the lack of a transcript of the hearing on the motion to suppress evidence. The trial court responded that there were many times when its court reporter or administrator had prepared transcripts on very short notice and that a transcript could have been prepared if it had been requested.

While it is also true that defense counsel maintained there would be no prejudice to the State if the trial were adjourned because the witnesses were local and "[o]ne is in lockup" and was "not going anywhere," she did not mention Dan Clayton when making that argument. It appears from the context of her statement that she was referring to codefendant Ryan Pollie, not Clayton. At no point during the oral motion or during the remainder of the trial did Petitioner or his attorney request a brief adjournment to interview or meet with Clayton.

Petitioner contends that his attorney was unprepared for trial and should have been granted an adjournment because the attorney was told that the trial judge was on vacation and would not be hearing the case on February 15, 2007. The attorney, in fact, testified at the post-conviction evidentiary hearing that the prosecutor and trial judge's staff had informed her the judge would not be present on February 15. She explained that she had set the matter for a conditional plea and subsequently learned that the prosecutor had scheduled the conditional guilty plea proceeding for the day of trial. (Evidentiary Hr'g Tr., 7-8, Oct. 22, 2007.)

Despite these indications that defense counsel had hoped for a conditional plea and stay of the circuit court proceedings, she indicated at the evidentiary hearing that the majority of her trial preparation was done in advance and that she was not planning to call any witnesses on February 15. (*Id.* at 22-23.) She also acknowledged that she had been involved in the case since the previous November, that she knew all the facts and issues, and even though the parties were still exchanging evidence, she typically used the days immediately before trial to prepare her opening statement and to focus on what she was going to do at trial. (*Id.* at 22-23, 34-35.)

It was not unreasonable for the trial court to conclude at the evidentiary hearing that defense counsel had sufficient time to prepare for trial and actually was prepared for trial even if she was not as well prepared as she had wanted to be. (*Id.* at 112, 116-19.) And it was not unreasonable for the Michigan Court of Appeals to affirm the trial court on this issue.

Petitioner has failed to show that his constitutional rights to due process and to present a defense were violated by the trial court's refusal to grant an adjournment of the trial. Therefore, Petitioner has no right to relief on the basis of his fifth claim.

E. Trial Counsel

Petitioner contends that his trial attorney rendered ineffective assistance by not objecting to the prosecutor's closing argument or to the police officers' hearsay testimony about the tip they received. Petitioner also contends that his attorney was unprepared for trial.

1. Clearly Established Federal Law

The Constitution "does not guarantee the right to perfect counsel; it promises only the right to effective assistance . . ." *Burt v. Titlow*, __ U.S. __, __, 134 S. Ct. 10, 18 (2013). To prevail on his claim, petitioner must show that his attorney's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the

> circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Id. at 690.

An attorney's performance is deficient if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689.

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action

> "might be considered sound trial strategy." See *Michel v. Louisiana*, [350 U.S. 91, 101 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id.

To demonstrate that an attorney's deficient performance prejudiced the defense, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. The petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "This does not require showing that counsel's actions 'more likely than not altered the outcome,' " but "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S. Ct. at 792 (quoting *Strickland*, 466 U.S. at 693).

2. Failure to Object to Hearsay Testimony and the Trial Court's Failure to Make a Ruling

Petitioner alleges that his trial attorney should have objected to the testimony of Trooper Trevin Antcliff and Deputy Sheriff Adam Mercer regarding the anonymous tip that law enforcement officials received. Defense counsel did object when Sergeant Joel Abendroth subsequently testified about the tip, but Petitioner claims that the failure to object sooner, when it might have done some good, amounted to

ineffective assistance. Petitioner also claims that defense counsel was ineffective for not objecting to the trial court's failure to rule on defense counsel's objection to Sergeant Abendroth's testimony.

The Court concluded above that testimony about the anonymous tip was harmless. It follows that defense counsel's failure to object to Trooper Antcliff's and Deputy Mercer's testimony regarding the anonymous tip did not prejudice Petitioner's defense.

As for defense counsel's failure to object to the lack of a court ruling on counsel's objection to Sergeant Abendroth's testimony about the tip, a ruling was unnecessary because the prosecutor agreed to "move on" after defense counsel made her objection. (Trial Tr., 188, Feb. 15, 2007.) Defense counsel's failure to object to the lack of a ruling did not amount to deficient performance.

3. Failure to Object to the Prosecutor's Closing Argument

Petitioner contends that defense counsel should have objected to the prosecutor's closing argument about why he offered to let Ryan Pollie plead guilty to a lesser offense and why he did not ask the K-9 officer and fingerprint analyst to testify. The prosecutor's comments, however, were not improper. The prosecutor's reasons for offering a plea bargain to Ryan Pollie were tied to the evidence, and the prosecutor's comments about not calling certain witnesses was a direct response to defense counsel's closing argument. Therefore, defense counsel's failure to object to the comments did not amount to deficient performance.

4. Preparation for Trial

Petitioner's final allegation about trial counsel is that she was unprepared for trial. Petitioner contends that the prosecutor and trial court's staff misled his trial attorney about the trial date. Petitioner also contends that his trial attorney expected the case to conclude with a plea and did not take any steps to prepare for trial. He claims that trial counsel learned of a defense witness on the morning of trial, and that, if she had more time to prepare, she would have interviewed Dan Clayton and any other witnesses who knew about Ryan Pollie's jailhouse admissions. The Michigan Court of Appeals found no merit in Petitioner's claim about trial counsel and concluded that Petitioner had not overcome the presumption of effective assistance of counsel.

a. The Evidentiary Hearing

Defense counsel testified at the evidentiary hearing that the majority of her trial preparation typically is done in advance and that she was not planning to call any witnesses on February 15. She also acknowledged that she had been involved in the case since the previous November, that she knew all the facts and issues, and even though the parties were still exchanging evidence, she typically used the days immediately before trial to prepare her opening statement and to focus on what she was going to do at trial.

As for Dan Clayton, defense counsel testified that she could not recall everything Petitioner had said about the potential defense witness, but she thought that Petitioner had said someone in lockup may have

overheard that Ryan Pollie was lying. (Evidentiary Hr'g Tr., 29, Oct. 22, 2007.) Defense counsel learned about Dan Clayton either during a conversation with Petitioner on the afternoon before trial or on the morning of trial. She thought it more likely than not that she had learned about Clayton on the day of trial, because (1) she did not consider the witness when planning her trial strategy, (2) she would have gone to see him in jail before trial if she had known about him, and (3) she did not mention Clayton by name in her written motion to adjourn the trial. (*Id.* at 9, 21 23.) She claimed that, if the trial court had granted her request for an adjournment on the day of trial, she would have met with anyone suggested to her by Petitioner. She also would have subpoenaed the person as a trial witness because the person would have buttressed what she thought Pollie was going to say or he would have contradicted Pollie's testimony and could have been used for impeachment purposes. (*Id.* at 13.)

Trial counsel nevertheless testified that she had done the majority of her preparation for trial and the things that she had not been able to do to her satisfaction was prepare her opening statement and finalize the defense theory. Part of the problem was the uncertainty about whether Petitioner would enter a plea. (*Id.* at 22-23, 33-34.)

Danny Clayton testified at the hearing that he, Petitioner and Ryan Pollie were housed together at the Ionia County Jail after Petitioner's arrest. He claimed that Pollie had said Petitioner should accept responsibility for their arrest because Petitioner was on parole anyway and the evidence pointed to him.

Pollie also promised to provide Petitioner with $150.00 a month if Petitioner accepted responsibility for the case. Petitioner allegedly replied, "Why would I do that; it wasn't my dope." (*Id.* at 41-42.) According to Clayton, eighteen to twenty people out of twenty-four people in their jail unit knew that Pollie was making admissions and that Pollie testified against Petitioner to get out of the trouble he was in. (*Id.* at 56-58.)

Clayton denied receiving any benefit for his testimony, but he admitted that he probably wrote close to one hundred letters to the prosecutor, the trial court, and other individuals seeking consideration on his sentence in return for information about drug dealers in jail. He also admitted to relentlessly seeking consideration for information about an unrelated murder. (*Id.* at 50-51.)

Petitioner testified at the hearing that he was housed with Clayton and Pollie in the Ionia County Jail for about two weeks after his arrest. During that time, Pollie repeatedly asked him to plead guilty in return for $150.00 a month, because the cocaine was in Petitioner's car and Petitioner was on parole anyway. (*Id.* at 63.) Petitioner claimed that he was subsequently sent to another unit and that, during the weekend before his trial, he learned from a porter in the jail that someone had information for him regarding what Ryan Pollie had said. The porter did not know the person's name, but during the week of trial, the porter told him that Ryan Pollie had informed Dan Clayton of some things that might help Petitioner. Petitioner then called his attorney and informed her on the day before trial that there was a

witness in jail who had some information which was expected to help him. (*Id.* at 64-68, 73.)

When questioned by the trial court, Petitioner stated that, after Ryan Pollie decided to testify against him, he (Petitioner) had been willing to enter a plea on the condition that he could preserve his right to appeal. He admitted that his plea would not have been truthful. In other words, he would have lied to the court. (*Id.* at 81-82.)

Petitioner's trial attorney was recalled after Petitioner testified. She testified that she was not prepared as well as she would have liked to have been, but that she knew the facts of the case. As far as what witnesses would be available and what evidence would be admitted or excluded, she did not know that until shortly before trial because of the uncertainty about what Ryan Pollie would say at trial and whether he would testify for or against Petitioner. She nevertheless thought that she did a good job and that she had done the best she could with what she had. (*Id.* at 91-92, 96.)

The trial court denied Petitioner's motion for new trial because it did not believe that Petitioner told his attorney about Dan Clayton or any other witnesses. The trial court did not think that either Clayton or Petitioner were credible, and the court opined that, even if Clayton had testified, it would not have made a difference in the trial. The trial court concluded that defense counsel had been prepared and that she preformed competently. The Michigan Court of Appeals agreed with the trial court that Petitioner's claim about trial counsel lacked merit.

b. Analysis

The state courts' conclusions about defense counsel being adequately prepared for trial are supported by the record. Although defense counsel apparently was not as well prepared as she would have liked to have been, she performed adequately. She made an opening statement, cross-examined each prosecution witness, and argued in favor of a motion for directed verdict of acquittal.

On cross-examination of Ryan Pollie, defense counsel elicited testimony that Pollie had used cocaine in the past and that he had prior convictions for possession of cocaine and for delivery of cocaine. She also brought out that, even though Pollie was charged with the same crime as Petitioner, he pleaded no contest to a reduced charge and was expecting a lesser sentence. She also elicited testimony that, when Pollie and Petitioner were stopped on the highway, Pollie failed to tell the police any of the things that he testified about at trial.

During her closing argument, defense counsel pointed out that at least one of the officers who testified at trial had trouble identifying Petitioner. She also emphasized that no fingerprints were found on the bag of cocaine, and that there was no paraphernalia or other indications in the car that Petitioner was a drug dealer. She argued that Pollie was an admitted liar and that his testimony was severely compromised by the fact that he was a user and dealer of drugs and had made a bargain for his testimony. She also claimed that the prosecution had failed to prove that Petitioner knew the cocaine was in the car and that he had the specific intent to sell it.

As for the failure to interview Dan Clayton, it is unlikely that Clayton's potential testimony about Ryan Pollie being the sole owner of the cocaine in Petitioner's car would have made a difference in the trial. Defense counsel questioned Pollie about whether he had driven the car to Detroit and whether it was his idea to go to Detroit to meet a friend named Dave. As the Michigan Court of Appeals recognized, trial counsel pursued the same theory of defense that Clayton's testimony would have supported, namely, that the drugs found by police belonged to Ryan Pollie, not Petitioner. The Court of Appeals correctly concluded that the jury apparently did not find this line of argument persuasive.

Clayton, moreover, would have been subject to impeachment with his criminal record and many attempts to obtain consideration for his testimony. There is a strong possibility that the prosecutor "would have successfully portrayed Clayton as a willing snitch who was eager to cooperate with law enforcement on others' cases in order to receive more lenient treatment in his future dealings with the Department of Corrections." *Etherton*, Mich. Ct. App. No. 277459, at 4.

The Court concludes that trial counsel was adequately prepared for trial, and there is not a substantial probability that Dan Clayton's testimony would have altered the result of the trial. Thus, the failure to interview and possibly produce Clayton as a defense witness and the alleged failure to prepare more thoroughly for trial did not prejudice Petitioner. He has no right to habeas relief on the basis of his claim about trial counsel's alleged unpreparedness.

F. Appellate Counsel

Petitioner's seventh and final claim alleges that appellate counsel was ineffective for failing to raise all of Petitioner's habeas claims on direct appeal. The trial court was the only court to issue a reasonable decision on this claim, and it concluded that Petitioner had failed to overcome the presumption that his appellate counsel's decisions constituted sound strategy.

1. Clearly Established Federal Law

An appellate attorney's failure "to raise an issue on appeal can amount to constitutionally ineffective assistance," *Jalowiec v. Bradshaw*, 657 F.3d 293, 321 (6th Cir. 2011), *cert. denied*, __ U.S. __, 133 S. Ct. 107 (2012), but an appellate attorney is not required to raise every non-frivolous issue suggested by the defendant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Jalowiec*, 657 F.3d at 321. To demonstrate that appellate counsel was ineffective, Petitioner must show (1) that his attorney unreasonably failed to discover and raise nonfrivolous issues on appeal and (2) a reasonable probability that he would have prevailed on appeal but for his appellate attorney's failure to raise the issues. *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citing *Strickland*, 466 U.S. at 687-91, 694).

2. Application

Petitioner asserts that appellate counsel was ineffective for failing to raise on direct appeal habeas claims one, two, three, four, and the portion of claim six that alleges trial counsel was ineffective for failing

to make certain objections. Petitioner claims that, although appellate counsel raised meritorious issues about the trial court's denial of an adjournment and trial counsel's failure to prepare for trial, the inclusion of those issues on appeal does not excuse the failure to raise the other issues. Petitioner maintains that he probably would have gotten a reversal if appellate counsel had raised all his claims on direct appeal.

This Court finds that Petitioner's appellate attorney did a commendable job on appeal. She raised questions about the denial of the motion to adjourn the trial, trial counsel's unpreparedness, Dan Clayton's allegations about Ryan Pollie, the trial court's denial of the defense motion to suppress evidence, and the scoring of the state sentencing guidelines. The issues were significant enough to require an eight-and-a-half-page, single-spaced court opinion to resolve them.

Further, for the reasons given in the discussion above, the issues that appellate counsel did not raise on appeal lack merit, and there is not a reasonable probability that Petitioner would have prevailed on appeal had counsel raised the issues. While a different lawyer might have included all of Petitioner's habeas claims in the appeal of right, the decision not to include all of Petitioner's claims was not unreasonable and "affords no basis for [the Court] to conclude that [appellate counsel] was not functioning as 'counsel' in the Sixth Amendment sense." *McMeans v. Brigano*, 228 F.3d 674, 683 (6th Cir. 2000) (citing *Jones v. Barnes*, 463 U.S. at 750–54). An appellate attorney is not ineffective for failing to raise a meritless issue. *Shaneburger v. Jones*, 615 F.3d 448, 452 (6th Cir.

2010) (quoting *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001)), *cert. denied*, __ U.S. __, 131 S. Ct. 1013 (2011). The Court therefore declines to grant relief on Petitioner's claim of ineffective assistance of appellate counsel.

IV. CONCLUSION

The state court decisions in this case were not contrary to Supreme Court precedent, an unreasonable application of Supreme Court precedent, nor an unreasonable determination of the facts. The state court decisions certainly were not so lacking in justification that there was an error beyond any possibility for fairminded disagreement. Therefore, the petition for a writ of habeas corpus [dkt. #1] is **DENIED**.

V. CERTIFICATE OF APPEALABILITY

Petitioner may not appeal this decision unless a district or circuit judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b)(1). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When, as here, "a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is

straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

Reasonable jurists could debate the Court's assessment of claim one (violation of the Confrontation Clause), claim three (vouching), claim six (ineffective assistance of trial counsel), and claim seven (ineffective assistance of appellate counsel). Therefore, a certificate of appealability may issue on claims one, three, six, and seven. Reasonable jurists would not find debatable or wrong the Court's assessment of claim two regarding the prosecutor's explanations, claim four regarding the presentation of untrue testimony, or claim five regarding the denial of an adjournment. The Court therefore declines to grant a certificate of appealability on claims two, four, and five.

S/Arthur J. Tarnow
Arthur J. Tarnow
Senior United States District Judge

Dated: February 26, 2014

I hereby certify that a copy of the foregoing document was served upon parties/counsel of record on February 26, 2014, by electronic and/or ordinary mail.

S/Catherine A. Pickles
Judicial Assistant

Order

Michigan Supreme Court
Lansing, Michigan

Marilyn Kelly,
Chief Justice

Michael F Cavanagh
Maura D. Corrigan
Robert P Young, Jr.
Stephen J. Markman
Diane M. Hathaway
Alton Thomas Davis,
Justices

October 26, 2010

141119

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 141119
COA: 295566
Ionia CC: 06-013467-FH

TIMOTHY ETHERTON,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the March 31, 2010 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of

establishing entitlement to relief under MCR 6.508(D).

DAVIS, J., not participating. I recuse myself and am not participating because I was on the Court of Appeals panel in this case. See MCR 2.003(B).

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 26, 2010 — *Corbin R. Davis*
Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v Timothy Etherton	Donald S. Owens Presiding Judge
Docket No. 295566	William C. Whitbeck
LC No. 06-013467-FH	Alton T. Davis Judges

The Court orders that the application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 31 2010	*Sandra Schultz Mengel*
Date	Chief Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR IONIA COUNTY

100 W. Main State Street. Ionia, MI 48846
616.527.5336

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v File #06-H-13467-FH
OPINION

TIMOTHY ETHERTON,
Defendant.
_____/

Defendant has filed a Motion for relief from judgment and supporting brief alleging six issues, including ineffective assistance of trial and appellate counsel. Defendant's conviction and sentence was affirmed on appeal. Accordingly, the first question is whether the court can even grant relief under MCR 6.508(D)(3) which precludes any relief from judgment if the requested grounds for relief could have been raised on appeal from the conviction and sentence. Defendant does not argue nor demonstrate good cause for the failure to raise the now disputed grounds on appeal. Defendant instead asserts an expanded interpretation of 'jurisdictional defects' to justify his motion for relief from judgment. However, not every alleged error is jurisdictional.

With regards to the evidentiary objections and alleged prosecutorial misconduct, mere irregularities, evidentiary or procedural errors, and allegations involving review of the merits of the case are not jurisdictional defects under MCR 6.508(D). "[O]nly those challenges that question the very authority of the court to convict and sentence the defendant constitute jurisdictional defects." *People v Carpentier,* 446 Mich 19, 45-46 (1994). Examples of jurisdictional defects are improper personal or subject-matter jurisdiction, double jeopardy, imprisonment where the trial court had no authority to sentence the defendant to the institution, or when the defendant was convicted of no crime at all. *People v Blume,* 443 Mich 476 (1993); *People v Johnson,* 396 Mich 424 (1976); *People v Ginther,* 390 Mich 436 (1973); *In re Bourne,* 300 Mich 398 (1942); *In re Van Dyke,* 276 Mich 32 (1936); *In re Allen,* 139 Mich 712 (1905). With the exception of the failure to appoint counsel, constitutional violations, including the denial of the effective assistance of counsel, do not constitute a jurisdictional defect under MCR 6.508(D). *Carpentier, supra,* 49 n 9.

Although not actually argued, newly discovered evidence can constitute good cause under MCR 6.508(D) notwithstanding the lack of any jurisdictional defect.

A new trial may be granted on the basis of newly discovered evidence. *People v Davis,* 199 Mich App 502 (1993). However, newly discovered evidence does not justify a new trial when, as in this case, it does not relate to the defendants' guilt or innocence but rather is offered to impeach the character and credibility of a

prosecution witness. *People v Duncan,* 414 Mich 877, 877-878 (1982). In this case defendant asserts that the prosecutor's fingerprint expert committed perjury evidenced by his offering of a post trial affidavit from his expert countering the prosecutor's witness' testimony at trial. However, common sensibly, contrary to defendant's position, countering positions by expert witnesses is not necessarily equivalent to perjury. If countering experts were to constitute good cause, there would reasonably be no finality to the entry of a conviction in a criminal matter. One would only need to find an expert post trial willing to offer a countering opinion.

Although also not argued by defendant, there is a good cause exception in MCR 6.508(D) for ineffective assistance of trial and appellate counsel. *People v Reed,* 449 Mich 375, 378 (1995). If, however, there is demonstrated good cause, MCR 6.508(D) also then requires defendant to show actual prejudice from the alleged irregularities that support the claim for relief. Actual prejudice is defined as but for the alleged error, the defendant would have had a reasonably likely chance of acquittal or "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case. MCR 6.508(D)(3)(b)(i),(iii).

The test for ineffective assistance of appellate counsel is the same as that for ineffective assistance of trial counsel. *People v Pratt,* 254 Mich App 425 (2002). A defendant must show that appellate counsel's decision not to pursue an issue on appeal fell below an objective standard of reasonableness and

that the representation so prejudiced defendant as to deprive him of a fair trial. *Reed, supra* at 390. The test, however, is not whether, in hindsight, appellate counsel failed to raise all arguable or colorable claims. *Id.* at 382. Such a test would undermine the strategic and discretionary decisions that are the essence of a skillful trial and appellate attorney. *Id.* at 386-387

In this case defendant has failed to overcome the presumption that his appellate counsel's decisions constituted sound strategy. *People v Riley* (After Remand), 468 Mich 135, 140 (2003). Appellate counsel may have correctly discerned that trial counsel's failure to object to the admission of the evidence was the product of trial strategy. With regards to the non-objection to testimony relating to an anonymous tip, this appeared to be in conjunction with trial counsel's strategy to show defendant's non-involvement and possible responsibility of the passenger (who was also charged). With regards to the court's alleged failure to respond to a related objection (T, 188) the transcript reflects that after the objection the prosecutor indicated he would move on, negating the need for the court to respond to counsel's objection. Counsel also fails to mention that the court specifically instructed the jury that the tip was not evidence, but only to show why the police did what they did. (T, 248). This court has reviewed the objected to comments by the prosecutor in his closing argument (T, 216, 217). The same appear to be in response to the defense theories of the case and do not appear to be erroneous or, if so, unduly prejudicial. The comments as to the passenger (T, 217) maybe went beyond what would be desired in a perfect world, but were also based upon the passenger's testimony. The jury was further

instructed that the attorneys' arguments are not evidence (T, 247) and to only accept things the lawyers say that are supported by the evidence or by their own common sense and general knowledge (T, 248). Defendant has failed to rebut the presumption that "appellate counsel's decision regarding which claims to pursue was sound appellate strategy." *Hurst, supra* at 642; *Reed, supra* at 391 ("[A]ppellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance.")

Defendant has also failed to meet his burden of demonstrating "actual prejudice from the alleged irregularities that support the claim for relief." MCR 6.508(D)(3)(b). No such "reasonably likely chance of acquittal" existed in the instant case in spite of the alleged errors. There was ample evidence to convince the jury of defendant's guilt and the complained of errors, even if true, would not have changed the outcome in this case. Defendant's allegations that appellate counsel failed to argue the now asserted issues on appeal remain insufficient to overcome the presumption that counsel functioned as a reasonable appellate attorney in selecting the issues presented. *Reed, supra,* 646.

IT IS ORDERED that defendant's motion is denied.

Dated: November 30, 2009

Hoort
David A. Hoort,
Circuit Judge

cc: Prosecutor (IO), Defendant (M)